REPORTS
AND
CASES
TAKEN
In the third, fourth, fifth, sixth, and seventh years of the late
KING CHARLES.

As they were argued by most of the Kings Sergeants at the Common-Pleas Barre.

COLLECTED and REPORTED,
By that Eminent Lawyer, Sir *Thomas Hetley* Knight,
Sergeant at Law, sometimes of the Honourable Society of Grayes-Inne, and appointed by the King and Judges for one of the Reporters of the Law.

Now Englished,

With an exact Table of the Principal matter therein contained; and likewise of the Cases, both Alphabetical.

LONDON,
Printed by *F. L.* for *Matthew Walbancke* at *Grayes-Inne* Gate, and *Thomas Firby*, near *Grayes-Inne* in *Holborn*, 1657.

To the Reader.

READER,

I Have here recommended to you ſome few Caſes, Reported by one eminently famous in the Law; One whom (I believe) the King *Ex certa ſcientia & mero motu* advanced to that Honorable Imployment, as you find.

The Caſes we ſee are Modern, and therefore more generally known by moſt of your Antient Practicers now being. There is excellent Learning in every Caſe; To which you have the Teſtimony of a worthy Perſon, Sergeant *Clark*. You may perchance wonder why one Caſe is particularly in *French*! Truely the Eſteem that I not only ſet upon the Law, but its priſtine Language, induced me to give the Book a reliſh with that, which is not ungrateſull (I believe) to any Lawyer. If others carpe at it, becauſe they underſtand it not, or have any particular *Odium* to the Tongue, I deſire them not to rant at my Author, but let their Mothers Tongue hiſſe at me. To invent Terms and Panegyricks on the Author, or his Writings, with that vulgar intention of ſome, will make me ridiculous, and be diſhonorable both to his Perſon and Profeſsion. But the greateſt Rhetorick and Epethites you can endeavour at, to complement the Reporter (becauſe if there be a failer of Selling, the Stationer will ſay the *Remora* was in my Epiſtle, and not in the Caſes) is not ſo great as. Reader theſe are Sir *Thomas Hetleys* Reports.

I *Conceive that these reported Cases may be very usefull, and so fit to be printed.*

9th *Febr.* 1656.

Jo. Clark.

A

TABLE

OF THE

CASES

Contained in this

BOOK.

A

A Bree against Page. 9
A Ayliffs Case. 10
Abrees Case again. 15
Andrews against Bird. 33
Allen against Westby. 93
The same. 117
Andrews against Hutton. 130
Allestons against Moor. 167

B

BLackhall against Thursby. 2
Bowet and Langhams Case. 9
Bear against Hodges. 12
Bayliffs Servant. ibid.
Bear and Hodges again. 16
Beguall against Owen. 31
Booth against Franklin. 33
Barret against Barret. 63
Bradlies against Johnson. 63
Bromleys Case. 66
Lady Burtons Case. 68
Bentons Case. 73
Bateman against Ford. 81
Benson against Saukeridge. 84
Bibble against Cunningham. 89
Binge against Hodges. 107
Bristows Case. ibid.
Bromfields Case. 110
Brown against Hancock. 111
Barleys Case. 118
Braces Case. 120
Bragge and Bristows Case. 126
Bells Case. 134
Beckrows Case. 138
Bill against Sir Arthur Lake. ibid.
Boydens Case. 148
Bachus and Hiltons Case. 150
Browns Case. 164
Buts against Foster. 165
Baker against Webberly. 171

C

CHichely Dame againſt Biſhop Ely. 17
Creedlands Caſe. 18
Vicar of Cheſhams Caſe. 54
Comins Caſe. 60
Comin againſt Carre. 61
Crooks Caſe. 72
Conyers's Caſe. 77
Cholaner againſt Ware. ibid.
Cocket againſt Delayhay. 114
Calthrop againſt Allen. 119
Coventries Caſe.
Clotworthy againſt Clotworthy. 137
Coſtrill againſt Sir George Moor. 143
Cambridge Univerſity. 145
Clotworthy againſt Clotworthy. 148
Wife of Clobarn againſt her Husband. 149
Caſon againſt her Husbands Executor. 158
Cave Sir William againſt Sir William Fleetwood. 159
Canterbury Archbiſhop againſt Hudſon. 164
Crompton againſt Waterford. 167
Coxhead againſt Coxhead. 168
Champues Caſe. 166
Collins againſt Thoroughgood. 171
Chamberlins Caſe. 172
Croſſes Caſe. 177

D

DUncomb againſt Sir Edmond Randall. 34
Davies againſt Forteſcue. 56
Doyly an Infants Caſe. ibid.
Dickſons Caſe. 64
Deakins Caſe. 73
Doſwell againſt James. 79
Dolbins Caſe. ibid.
Dickſons Caſe. 90
Denne againſt Burrough. 105
Dickſon & Ux. againſt Blyth. 110
Denne and Sparks Caſe. 113
Dawthorn againſt Bullock. 131
Sir Richard Dorrell againſt Blagrave. 135
Deins Caſe. 148
Dixy againſt the Bayliffs of Darby. 159
Darlyes Caſe. 177

E

EAton and Morris's Caſe. 11
Eve againſt Wright. 21
Eaton againſt Ayliff. 94
Eaglechilds Caſe. 167

F

FAwkner againſt Bellingham. 28
Fawns Caſe. 31
Fawkner againſt Bellingham. 38
Feaks againſt 69
Fenne againſt Thomas. 73
Fawkners Caſe. 74
Foſſams Caſe. 79
Fox againſt Vaughan and Hall. 86
Faulkners Caſe. 88
Forteſcue againſt Jobſon. 90
Fox Sir Charles's Caſe. 91
Fawkner againſt Bradly. 95
Farrington againſt Kemarre. 101
Fowlers Caſe. 116
Feltons Caſe. 126
Farmer againſt Sherman. 133
Fawkenbridges Caſe. 144
Flower againſt Vaughan. 147
Foxes Caſe. 157

G

GAmmons Caſe. 17
Giles againſt Balam. 19
Gammons Caſe again. 26
Goodridges Caſe. 37
Garton againſt Mellows. 50
Grimſton againſt an Inkeeper. 51
Grange & Ux. againſt Grimſtone. 55
Gerrard againſt Boden. 80
Groves againſt Osborn. 81
Gammon againſt Malborn. 84
Ganfords Caſe. 85
Gamons Caſe. 93
Goddard and Tylers Caſe. 100
Goſſe againſt Skipton. 117
Gooderidges Caſe. 119
Grays Caſe. 134
Gee againſt Egan. 169
Green againſt Bronker et al. 166
Goſſe againſt Brown. 175
Gibbes againſt Jenkins. ibid.

H

HUmbleton againſt Buck. 4
Hartopp and Tucke againſt Dalby 14
Humbletons Caſe before. 21
Heels Caſe. 32
The Vicar of Hallifaxes Caſe. 34
Howes Caſe. 38
Haſſel Executors Caſe. 48
Hodges againſt Franklin. 51
Harris againſt Marre. 57

Har-

Harvey againſt Fitton. 68
Hobſons Caſe. 73
Holt Sir Thomas againſt Sir Thomas Sandbars. 74
Holford againſt Gibbes. 85
Hamkeridges Caſe. 88
Humbertons Caſe. 97
Howſons Caſe. 104
Hall and Blundells Caſe. ibid.
Holmes againſt Cheney. 106
Humlocks Caſe. 109
Holmes againſt Cheny. 113
Harding againſt Turpin. 132
Hutchinſon againſt Cheſter. ibid.
Sir John Halls Caſe. 130
The ſame. 131
Hide againſt Ellis. 133
Haws's Caſe. 141
Hides Caſe. 146
Harris againſt Lea. ibid.
Hitcham againſt an Attorney. 169, 172
Hadves againſt Levit. 176

I

Johnſon againſt Morris et al. 30
James et al. againſt Thoroughgood. 31
Ireland againſt Higgins. 52
Jenkins Caſe. 52
Johnſon againſt Williams. 55
Jenkin againſt Lime. 56
Jeffreys Caſe. ibid.
Iacobs Caſe. 75
Ienkins againſt Dawſon. 78
Iacob againſt Iacob. 83
Iohnſons Caſe. 88
Iſham and Lawns Caſe. 97
Jenkins's Caſe. 119
Iohnſons Caſe. 145
Iennings againſt Couſins. 165

K

Kitton againſt Watts. 12
The King againſt Clough. 83
The King againſt the Biſhop of Canterbury. 99
Keen againſt Cox. 119
The King againſt the Archbiſhop of Canterbury et al. 124
Knight againſt Simonds. 146

L

Lowen againſt Cocks. 63
Lynne againſt Conningham. 95
Luvered againſt Owen. 121
Litman againſt Weſt. 123
Laſhes Caſe. 132

M

Marſh againſt Culpepper. 1, 8
Mady againſt Oſan et al. 4
Marſhes Caſe again. 11
Manſer againſt Lewes. 18 vel 21
Moor againſt Penruddock. 38
Manninghams Caſe. 115
Mercer et ux. againſt Cardock. 119
Munday againſt Martin. 120
Middleton againſt Sir John Shelley 133
Merrick againſt King. 137
Sir Richard Moors Caſe. ibid.
Moor againſt Everay. 144
Moſſes Caſe. 148
Mortimers Caſe. 150
Earl of Mulgrave againſt Ratcliff. ib.
Malins Caſe. 164
Male againſt Ket. 172

N

Northerns Caſe. 57
Norbery againſt Watkins. ibid.
Norris againſt Iſham. 81
Norton Joyce et al. againſt Harmer. 88
Newton againſt Sutton. 105
Nortons Caſe. 110
The ſame. 117
Napper againſt Steward. 133
Nurſe againſt Pounford. 161

O

Owen Dorothy againſt Owen Price. 22
Owen againſt Price. 29
Overalls Caſe. 157
Overalls Caſe. 158

P

Paſton againſt William Manne. 5
Provender againſt Wood. 32
Peto Sir Edward againſt Pemberton. 52
Perriman againſt Bowden. 59
Palmers Caſe. 62
Panton againſt Haſſell. ibid.
Peaſe againſt Thompſon. 66
Peitoe's Caſe. 71
Plowmans Caſe. 73
Peters againſt Field. 75
Perkins againſt Butterfield. ibid.
Mrs. Peels Caſe. 107
Port againſt Yates. 114
Page againſt Taylor. ibid.
Pinſons Caſe. 125
Plummers Caſe. 130

Coun-

Countess of Purbecks Case. 131

R

Readings Case. 18
Rowes Case. 32
Margery Rivets Case. 35
Rivets Case. 60
Roberts and others. 61
Rothwells Case. 91
Rowe and Dewbancks Case. 94
Rolls against How. 117
Read against Eaglefield. 122
Rises Case. 147
Rawlings's Case. 161
Rawling against Rawling. 163
Raveys Case. 175

S

Smith against Dr, Clay. 3
Smith against Secheverill. 51
Score and Randalls Case. 57
Score against Randall. 66
Symons against Symons. 66
Stamford and Coopers Case. 72
Spark against Spark. 73
Saulkells Case. 78
Swintons Case. 84
Stanleys Case. 93
Dame Sherleys Case. 95
Sacheverills Case. 105
Strange against Atthowe. 116
Spencer Sir John against Scroggs. 121
Stone against Walsingham. 123
The same. 128
Smith & al. against Pannel. 132
Scot against Wall. 133
Starkey against Taylor. 139
Simcocks against Hussey. 142
Starkeys Case. 143
Sheriff Surrey against Alderton. 145
Springhall against Tuttersbury. 157
Stone against Tidderfly. 177

T

Thomas et Ux. against Newark 2
Taylor against Phillips. 10
Thomas's Case. 38
Thomsons Case. 53
Tomkins's Case. 57
Traver against the Lord Bridgewater et Ux. 62
Tomlins's Case. 64
Thomas against Morgan. 67
Tomlinsons Case. 75
Executors of Tomlinsons Case. 76
Thornells Case. 93
Thomas and Kennis's Case. 97
Thompson against Thompson. 110
Turner against Hodges. 126
Taylors Case. 136
Turner against Disbury. 149
Tomlins's Case. 163
Tomlinsons Case. 168
Tomkins's Case. 171

V

Viner et Ux. against Lawson. 14
Viner against Eaton. 86

W

Wilcocks Case. 27
Wood against Simons. 34
Wilkin against Thomas. 52
Wildshires Case. 54
Wentworth against Abraham. 55
Warberleys Case. 57
Winchester Bishop against Markham. ibid.
Wilkinsons Case. 56
Waterton against Loadman. ibid.
Winchesters Mayor and Commonalties Case. 57
Wolfes Case. } 59
Wilkinsons Case. }
Waddingtons Case. }
Williams against Bickerton. 63
Wilkins against Thomas. 65
Watson against Vanderlash. 69
Wakeman against Hawkins. 72
Williams against Thirkill. 73
Wilkinsons Case. 76
Wimberley against Taylor et al. ib.
Whiddons Case. 77
Wakemans Case 78
Wiggons against Darcey. 79
Woolmerstons Case. 85
Warmer against Barret. 87
Walsingham and Stones Case. 107
Wroth against Harvey. 119
Winchcombe against Shepard. ib.
Marques of Winchesters Case. 120
Wilson against Peck. 129
Wats against Conisby. 132
Dr. Wood and Greenwoods Case. 135
Sir Francis Worthly against Savill. 142
Wardens Case. 146
Wood against Carverner. 147
Williams against Floyd. 168
Waters against Thomson. 171

Y

Youngs Case. 54

A TABLE Of THE PRINCIPAL MATTER IN THIS BOOK.

A

THe assumpsion of the Husband shall in an Account charge the Wife *fo.* 1.

Action upon a libellous Letter. 10

Action for perjury, and what makes it. 12

Where a demand intitles to an Action 13, 16

Whether a Tenant in *Quid juris clamat* may attourn, without being sworn to do fealty to the Lord. 16

Action for words brought by a Maid. 18.

An arrest on Christmas day going to Church, in the Church-yard, may be censured. 19

Attourney fined for arresting in Actions of Debt without original. 29

Assumption upon mariage. 30

Action for saying one forged Deeds. 31

Action on the Case for stopping a River. 34

An Action for words brought by a Counstable. 36

Consideration upon an *Assumpsit* is not traversable, but he ought to plead the general Issue. 50

Action upon the Statute *de Scandalis magnatum.* 55

Those who sue at the Assise have protection. 33

Action for words. 63

Action for words against a Chirurgeon. 69, 70, 71

Warrant of Attorney may be entred after the Record removed. 59

Action for words, he hath forged a Deed, &c. 114

Action for saying he is falsly forsworn before, &c. 119

Whether in an Account there ought to be a certainty for what. 85, 106, 113, 122

Alimony is not within the High Commission Court. 95

High Commissioners have no conusans of Adultery. 108

Administrator has the same power as an Executor. 116

Appearance by Attorney saves an Obligation given to the Sheriff to appear. 117

Action for calling one a Daffidowndilly. 123

Action the Case for words against Attorney. 139

Convicted Barretor ſpoken to a common perſon is actionable. 143
A man having Land in right of his Wife in truſt, they cannot both join in the Action, but the Husband only. ib.
Action for words, Thou haſt ſtollen my corn out of my Barn. 172
An Action for *Welſh* words. 175

B

WHere a Bayliff ſhall be charged for money levied by him without warrant. 12
Juſtification as Bayliff upon a Diſtreſs. ib.
Recovery in Battery had againſt one, the other in another Action for the ſame Battery may plead the Firſt. 20, 33, 49
Garth againſt *Mellows* in Battery. 30
In Battery againſt Baron and Feme, the wife ought to plead as wel as the Baron. 10

C

WHat amounts to a forfeiture of a Copihold. 6, 7
In conſideration the Teſtator was indebted and youl forbear, good conſideration. 8. 62
A Chanceller cannot alter a Iudgement at Common, ſee how he ma, proceed againſt him. 20
One may diſtreyn for amerciament in a Court Leet. 21, 62
Iudgement given in an Inferiour Court, ſhall not be executed by Writ of a Superiour Court. 26
Officer of Common Pleas ought to be anſwered in any Action *de die in diem*. 29
They may examine in Chancery before Tryal. 30
Appearance of Clarks in Court ought to be in proper perſon. 36
Writ of Covenant brought upon a Leaſe of a Parſonage. 54
Ceſtui que uſe in tayl, what remedy. 57
Where *Habeas Corpus* on occaſion may be returnable immediate. 2
Cuſtom the life of a Copihold. 6
Leet is the Kings Court. 62
If a Chattel perſonal be ſuſpended by ſute, it is gone for ever. 71
The breach of the Covenant is the cauſe of Action. 212
If Copiholder make a Leaſe for years to commence at *Michaelmas*, 'tis a forfeiture preſently. 112
Where Cuſtome ought to be ſhewed, and where not. 159
A Writ of Enquiry may be granted after Verdict, when the Jury omit the dammages. 161
Upon Contracts the party ſhall have the Action to whom the Intereſt belongs. 176

D

NO diſcontinuance after Verdict. 3
To deny the Rent is a Diſſeiſin. 6
Demand of Rent ought to be according to the reſervation in the Deed. 59
Declaration or Replication ought to be certain to all intents. 60
Debt by Paroll diſcharged by Paroll. 73
Beaſts diſtrained for Dammage feſant not put in the open Pound, if they dye the Diſtreyn is chargeable. 75
A demand before a Diſtreſs, if the Demand is out of the Land, if not then, ſee 86
Where Damages ſhall not be mitigated. 93
Where a Demand ought to be certain, and where not. 109
On a *Devaſtavit* a Writ *de bonis propriis* iſſues. 110
If a Debtee mary Debtor, what becomes of the Debt, ſee 120
In what Caſes *A*, muſt declare *tam pro domino rege quam pro ſeipſo*. 122
Double delay not allowed. 126

E

DElay in arrear of Error not hinder Execution. 17
If a Sheriff remove his Proſoner out of the County without command, It is Eſcape. 34
Where he permits him to go for his pleaſure, Eſcapes lies. ibid.
Ne unque Executor found againſt him upon a *Scire fac.* ſhall be only *de bonis teſtat.* 48
Eject. firm. lies againſt Tenant at Will, if he leaſes for years. 73
If the Coniſee permits the Coniſor bring in execution to go at large, be an Eſcape. 79
Excommunication to ſtrike in the Church. 86
If an Executor dies before probate, the Goods belong to the Adminiſtrator of the firſt Teſtator. 105
A Rent upon Condition reſerved to the Executors, goes to the Adminiſtrator. 115
If a deviſe be void, if no Executor be made. 118
Ejectments do not lie of a Mannor. 146
In Ejectment he ought to ſhew the certain quanti-

quantity of Land. 176
Antient Demeſn is a good Plea in Ejectments. 177

F

A Franktenement cannot paſs from a day to come. 29
Feoffment to the uſe of a Stranger, ought to be tendered to him. 56
Denyal of the Rent a Forfeiture. 6
A Subject may have a Foreſt, but not a Juſtice Seat. 60
No Clergy for Felony committed upon the high way, otherwiſe upon the foot way. 75
In a *Formedon* he ought to make himſelf heir to him who died ſeiſed laſt of the Eſtate tayl. 78
Felony to take Pidgeons out of a Dove-coat. 149
Fieri Facias no Bar to the *Capias* although part of the debt be ſatisfied. 159

I

INdictment *quaſſavit* for incertainty. 35
Upon a Judgement, if the Money be paid to the Attorney it is good, but otherwiſe of a Scrivener. 48
Inne-Keeper ought to ſay in his Action, *tranſiens hoſpitavit*. 49
If Land be deſcended to an Infant, the Sheriff ſhall ſurceaſe his extent. 54, 59
Indgement had againſt an Infant may be reverſed. 65
Judgement reverſed for want of Pledge. 59
Imparlance roll may be amended. 143
Infans habeat eandem actionem poſſeſſoriam qualiter anteceſſor. 160
An iſſue miſtaken cannot be amended. 164

K

IF the King enters upon any Tenant, a Petition of right lies. 29
The King cannot take a man in execution out of Priſon to his wars, *cauſa vid.* 57.

L

VVHether a Leaſe to two be determined by the death of one. 85
Whether a Grant of Eſtovers out of another place, than was the Leaſe, be good. 78
Libell for the Seat in a Church. 94
Where upon a Leaſe the Heir ſhall be eſtopped, and where not. 91
Libell for Tithes of two pecks of Apples. 100

M

VVHat things go to the making of a Feme ſole Merchant. 9
Where *inter*-mariage is but a ſuſpenſion of a promiſe. 12
An action brought in conſideration of a mariage. 50
How a Lord ſhall recover in a Writ *de valore maritagii*. 55

O

FOr what Cauſes an Outlawry may be reverſed. 93

P

IN Partition no dammages are to be recovered. 34
Preſcription for Sallery of a Vicar is tryable at Common law. 33
Prohibition where the thing might be tryed, and proved at Common law. 15
Where Prohibitions ſhall be granted and where not. 19, 27, 28, 49, 50, 51, 60, 68, 69.
Parſon cannot diſcontinue. 88
Prohibition upon words. 94
A *Proteſtando* is no Anſwer. 104
Symony a good ſuggeſtion for a Prohibition. 116
Whether a Prohibition may be without alleging a Cuſtom. 117
Per minas pleaded. 121

R

VVHether the word *Succeſſive* ſo makes a Limitation of a Remainder, good matter and Caſes thereupon. 22, 23, 24, 25, 26
If a Feme ſole Executrix of a Term mary him in reverſion and dies, the Term is not drowned. 36
Releaſe of Actions and Sutes *ſubſtantive* bars Debt. 15
Nul tiel Record replyed where Recuſancy convict is pleaded by the Defendant, the Record muſt be ſhewn. 18
Where a Reverſion paſſes without Attornment. 73
Where one Requeſt may ſerve for ſeveral Debts. 84
Whether on a Reſcous the Action ſhall be brought by the Plaintiff againſt the Reſcouſor, or againſt the Sheriff. 95
Where no averment againſt a Record. 107
Where a Feme ſhall be remitted, and what makes

makes a Remitter. 110
No Reſcous can be of Goods. 145
Arrerages for rent upon an Eſtate for life cannot be forfeit for Outlawry. 164

S

TO grant a *Superſedias* there muſt be execution *erronice emanavit* alleged. 30
Surrender determines the Intereſt of all parties but a Stranger. 51
In Caſe of Symony the Statute makes the Church void. 51
No fee due to the Sheriff for the executing of a *cap. utlagat.* 52
That he might arreſt the Kings Servant upon this Writ. ibid.
Quicquid plantatur ſolo cedit ſolo. 57

T

TRover and converſion brought for a load of wheat. 22
A diſcharge of Tithes by the Parſon for years runs with the Land, and not with the perſon. 31
Where toll ought to be pleaded in Trover and converſion. 49
Treſpaſs againſt Baron et feme *dum ſola fuit*, both ſhall be taken. 53
If Part and Portion alike make joint tenancy, or tenancy in Common. 55
Treſpaſs brought by Baron and Feme, they muſt not ſay *ad damnum ipſorum*, otherwiſe of Jointenants. 2
Tithes of Fiſh due meerly by Cuſtom. 13
Tithes, where due by the Common law of the Land, no Prohibition. ibid.
Tithes of Limekills. 14
The word Equally makes Tenancy in Common. 64
No Treſpaſs lies againſt a Diſſeiſors Leſſee 66
Where Tithes of young Cattel. 85, 93
Tithes for hedging Wood. 18
A Term evicted on *Elegit* is grantable upon a Statute Merchant or Staple, not tithes for milk of Calves. 100
No Compoſition for tithes for life without Deed. 107
No tithes for Eſtovers burnt in an Houſe. 110

V

A Special Verdict may be amended according to the notes given to the Clark. 52
A Verdict finding matter repugnant, or which cannot come in queſtion, binds not the Court. 4
If a Scrivener, not the party, reſerve more than juſt intereſt, no Uſury. 11
Where the Viſne and the return differ, it is not good. 83
If Defendant dies between Verdict and Iudgement, Iudgement will be ſtayed. 90
Whether Beer Brewers are within the Statute and intent of Victuallers. 101

W

WAſte committed by a Stranger, the Leſſee dies, no remedy againſt the Seranger. 97
Tenant for life and he in remainder may join in Waſte. 105
The Warden of the Fleet nor Weſtminſter never ma take Obligations for Dyet. 146

Reports

REPORTS AND CASES TAKEN In the third, fourth, fifth, ſixth and ſeventh years of the Reign of the late King *Charles*, &c.

Ralph Marſh *againſt* John Culpepper.

RAlph Marſh brought an action upon the caſe againſt John Culpepper and Anne his wife, for an Aſſumpſit made by Anne, dum ſola fuit. And afterwards the Aſſumpſion is found by verdict. And Davenport moved in arreſt of Judgement, for that, that there was not a ſufficient conſideration; for whereas the wife was Adminiſtratrix to Goddard her firſt husband, who was indebted to the Plaintiff (for ſo the Plaintiff declared) and that he intended to ſue the wife as Adminiſtratrix, and that the wife requeſted him that two might ſurveigh the account between her husband and the Plaintiff, to which the Plaintiff aſſented, and that two ſurveighed it accordingly, when it appeared that the debt was due, and that then the foreacknowledgement, of her husband to be ſo indebted; In conſideration of the premiſes, aſſumed to pay the debt, part at Michaelmas, and the other part at a convenient time after: But there is noe conſideration to make her chargeable, de bonis propriis, as their purpoſe is to make her, (by their Declaration againſt her) and not as Adminiſtratrix: For it is not mentioned that in conſideration that ſhe had aſſetts, or that the Plaintiff would forbear to ſue her, or otherwiſe, &c. So that the debt of her husband by the Aſſumpſit cannot be changed to her own debt. And it is not like Banes caſe, Co. Re. 9. 94. For there the Plaintiff was to forbear to ſue him; and for that aſſets is not requiſite. The like is Beeches caſe, 15 Eliz. in that Court reported, New Entries, fol. 2. Richardſon of the ſame opinion, becauſe there is not any conſideration, nought but the aſſent of the wife to the accompt; which will hardly charge her de bonis propriis. See Co. lib. 6, 41.

Pasch. 3. Car. Com Banc.

Thomas & Ux. *against* Thomas Newark.

THomas and his wife brought Trespass against Tho. Newark for beating of the wife, and taking of the goods of the husband only, ad damnum ipsorum; and afterwards the matter was found by verdict; and it was moved, that the Declaration was nought; for the wife cannot joyn for a Trespass done to the husband alone; but in a trespass done to the wife alone, the husband ought to joyn, and for that the Court awarded, quod querens nil capiat per bill. But it was said by Crook and Yelverton, if baron and feme bring trespass for the beating the wife, the husband may declare for a trespass done to him, ad damnum ipsius, &c. But it was said by Hutton, if two joyn in trespass for taking goods whereof they were joyntly possest; one of them in an action cannot declare for taking of the goods of him alone: Which was agreed by Crook, &c.

Blackhall *against* Thursby.

ONe Blackhall petitions in the Court of Requests, to compel Thursby, Lord of the Manor to admit him to a Copyhold surrendred to his use, which he refused before to doe. And also forbad one, to whom the Copyhold was demised by Blackhall, to pay him any rent. Upon which it was decreed that Thursby should admit him to a Messuage, and 17 acres, whereas the Copy was of a Messuage, and 3 acres; and also that Thursby should set forth the bounds of the Copyhold, which he had defaced and removed, and that he pay the rent. Hitcham moved for a prohibition; for he said it was more just for a Court of Equity to compel a Lord to admit his Copyholder; for before admittance he cannot have an action, and he has no remedy at the Common-law: And so if a Copyholder removes or defaces the bounds of the Copyhold, it is proper for such a Court to design them. To which the Court agreed; but they would not compell him to admit him to the Messuage and 17 acres, where the Copy is but of three acres, which would be unjust; unless that the 3 would comprehend the other 14. But parcel or not parcel of Copyhold, belongs to the Common-law to try. But the Court denied the prohibition for that cause; for the Justices said, that that admittance to 14 acres does not bind the title; but it sets at liberty as to that. But if they had decreed; that he should be admitted and also enjoy it to him and his heirs, then the Decree had been unjust, and a prohibition for that. But for part of the Decree which touch'd the rent. It was agreed by the Court, if Thursby receive the rents, the decree was just, that he should pay it; but if he did not receive the rents, nor take the profits, but only forbad the Tenant to pay the rent, and he would save him harmless. Then if it was decreed that he should pay the rent, a prohibition to that part should be granted. And Harvey Justice in that case said; That he knew it to be adjudg'd, that a surrender, with the appurtenances, would pass land; And of a Messuage and 3 acres would pass more acres; if divers Copies successively have been so. And upon questioning of Blackhall by the Chief Justice for saying, that after there was a Decree in the Court of Equity, an Order of the Common-bench could not supersede the Execution of it. And Justice Yelverton declared, That when he was in the circuit at York, a poor man who sued before him in forma pauperis was arrested by process from the Council of York. And that upon notice of it, he commanded a writ of privilege to be made for him, but the Officer of the Council would not obey it; upon which he claps in a Habeas Corpus returnable at a certain hour; and the Officer came without the body, and refused to deliver the prisoner; and said that he had not power to controll the process of the Council. And upon that he set a fine upon him of 40 l. and his Act

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was approv'd on by the whole Court. For every one that ſues before the Aſsiz, ought to have free egreſs and regreſs, and ſtaying while his buſineſs was ended: And afterwards the Lord Preſident ſaid to Yelverton, that he would complain to the King and Privy Council of him, for that he had tranſgreſſed his authority and power. And the Court ſaid that they would juſtifie it, &c. *Paſch. 3 Car. Com. Banc.*

Smith *againſt* Doctor Clay.

HEnden moved for Doctor Clay Vicar of Hallifax, that a prohibition might be granted to the High Commiſsioners of York For that, that theſe Articles by one Smith were preferred againſt him, &c.

Firſt that he read the holy Bible in an irreverent and undecent manner, to the ſcandal of the whole Congregation.

Secondly, that he did not doe his duty in preaching; but againſt his Oath, and the Eccleſiaſtical Canon had neglected for ſundry mornings to preach.

Thirdly, that he took the Cups and other Veſſels of the Church, conſecrated to holy uſe, and employed them in his own houſe, and put barm in the Cups, that they were ſo polluted, that the communicants of the Pariſh were loath to drink out of them.

Fourthly, that he did not obſerve the laſt faſt, proclaimed upon the Wedneſday, but on the Thurſday, becauſe it was an Holyday.

Fifthly, that he retained one Steveſon in one of the Chapels of eaſe, who was a man of ill life and converſation (ſcilicet) an Adulterer, and a Drunkard.

Sixthly, that he did not catechiſe according to the Pariſh Canon: but only brought many of Dr. Wilkinſons Catechiſms; for every of which he paid 2 d. and ſold them to his Pariſhoners for 3 d. without any examination or inſtruction for their benefit. And that he, when any Commiſsions were directed to him, to compel any perſon in his pariſh to do penance, he cracted many of them, and ſo they were diſmiſſed, without inflicting any penalty upon them, as their cenſure was. And that he and his ſervants uſed divers menaces to his Pariſhioners, and that he abuſed himſelf, and diſgrac'd his function, by divers baſe labours (ſcilicet) He made mortar, having a leathern aprou before him, and he himſelf took a tithe Pig out of the Pigſty, and afterwards he himſelf gelded it. And when he had divers preſents ſent him, as by ſome, fleſh, by ſome fiſh, and by others ale, he did not ſpend it in the invitation of his friends and neighbours, or give it to the poor; but he ſold the fleſh to Butchers, and the ale to Alewives again; And that he commanded his Curat to marry a couple in a private houſe, without any licence, and that he ſuffered divers to preach, which peradventure had not any licence, and which were ſuſpected perſons, and of evil life. It was ſaid by Henden, that they cannot by the Statute of primo Eliz. cap. 1. meddle with ſuch matters of ſuch a nature, but only examine hereſies, and not things of that nature, and that the High-Commiſsioners at Lambeth, certified to them, that they could not proceed in ſuch things; and adviſed them to diſmiſs it; But they would not deſiſt, and the Judges, Richardſon being abſent, granted a prohibition, if cauſe were not ſhewed to the contrary.

Note, it was ſaid by the Juſtices, a diſcontinuance could not be after verdict.

Paſch. 3 Car. Com. Banc.

Humbleton *againſt* Bucke.

THeophilus Humbleton was Plaintiff in an Aſſumpſit againſt Bucke, and declares that whereas there was a controverſie between one Palmer, who pretended to be Lord of the ſoyl, and the Inhabitants of ſuch a Village concerning Commou in ripa maritima, which Palmer claimed to be his own ſoyl. The Tenants claim common there, and a liberty to cut graſs, and make hay of it, and to carry it away. Palmer incloſes the ſoyl; Humbleton enters upon the place incloſed, and alſo takes the graſs, being one of the Tenants: And Palmer brought a Treſpaſs againſt him, and then Bucke aſſumes to the Plaintiff, in conſideration of a Jugg of Beer, and in conſideration that the Plaintiff in the Treſpaſs hanging againſt him, would plead a Plea in maintenance of their title of Common, he immediatly would pay to him the half of his expences; or if he failed of that, he would pay him forty pounds. And further, he ſaid, that he pleaded not guilty in that action of Treſpaſs, which was found for him; and that he expended ſo much money, the half of which the Defendant refuſed to pay to him, &c. The Defendant pleads non defendit lectam in maintenance of their Common, which was found againſt him. And Davenport moved in arreſt of Judgement; becauſe that he ought to have pleaded ſuch a Plea, by which the title of Common might come in queſtion; but when he pleads not guilty, he diſclaims the matter of Common: And alſo the word immediatly is not to be taken ſo ſtrictly, that he ſhould pay the money in the ſame inſtant, &c. But the Plaintiff muſt declare what coſts he had expended, and then he ſhall have reaſonable time by the Statute to pay the money. But Athowe anſwered, that the verdict which was in the Kings Bench helps him; For it was there found, that that land was the Kings waſt, and that Palmer was not owner of the ſoyl, and therefore for that his plea was good: for the title of Common cannot come in queſtion. Richardſon Chief Juſtice ſaid, that that is not a maintenance of the title of Common againſt Palmer. Firſt, he cannot give that verdict in evidence, in a preſcription for the Common; and the maintenance by that Plea of not guilty is for the ſoyl, and not for the Common; and whoever is owner of the ſoyl, the title of Common is not ſpecially againſt Palmer, but it is general againſt every one in the world. And ſo was the opinion of Harvey and Crook: And Crook ſaid, that although the verdict had found the Aſſumpſit, and ſo admitted, that that plea was for maintenance of the title; yet that ſhall not bind us. For if a verdict finds matter which is repugnant, or a thing which cannot come in queſtion, it ſhall not bind us. But by Juſtice Yelverton it was ſaid; That becauſe the Jury have found the Aſſumpſit, they have admitted all the reſidue; And for that we do not doubt of it no more than the Jury have decreed. As in an Ejectione firm. If they be at iſſue upon the collateral matter, it ſhall be admitted, that there was an ejectment, and ſo it was adjudged. But this cauſe was deferred to another time, to be argued more, &c.

Meridith Mady *againſt* Henry Oſan, & aliis.

MEridith Mady brought debt againſt Henry Oſan, for that he and 5 others were bound to perform the Arbitrament of three elected by them and the Plaintiff concerning all tithes and all other matters of controverſie between them, and that they ſtill and all the Pariſhioners ſhould perform and ſtand to the award made, &c. And upon breach of the award made, was the action brought: For the award was, that when any of the Pariſhioners clip their ſheep, they ought to give notice to Mady

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the Parſon, to the intent that he or his Servants may be there: And the Defendant did not give notice, &c. The Defendant by rejoynder pleads, that Allen and others, that they were Deputies to receive the Tithe-wool, and that they, or one of them were preſent at the clipping; and ſo they demur. Athowe ſaid, that notice ought to be given to the Parſon himſelf, for perchance he would be there himſelf had he notice. And for that, the breach alleged is not anſwered. And alſo he ſaid, that they, or ſome of them were preſent, and does not name him as he ought, for he may come in iſſue, &c. Richardſon, If the Arbitriment was made for ſome things within the ſubmiſſion, and ſome things without; It is good for thoſe things that are within, and void for the reſidue; And although the Pariſhioners did not ſubmit, yet it is good, becauſe the ſix are bound for them. Hutton ſaid that the Award for the notice is not good; for it is not well aſſigned, where the notice ſhould be given. And an Arbitrement ought to be reaſonable, but it is unreaſonable that he ought to inquire Mady, wherefoever he is to give him notice, as Cook 77. Salmons Caſe. Crook ſaid, that the Award is good, and it ſhall be intended, that the Parſon is alwaies reſident in his Parſonage, as a Surrender or an Attournment ſhall be intended upon the Land, and it is not requiſite to name any place. And it ſeemed to Harvey, that the Arbitrement was good, although that all the Pariſhioners had not ſubmitted to it. Becauſe that theſe were bound for them. 18 E. 4. 22. & 10. 1. And Judgement was afterwards in the next Term given for the Plaintiff. Paſch 3 Car. Com. Banc.

John Paſton *againſt* William Manne.

John Paſton brought an Ejectione firm. againſt Manne, and a ſpecial verdict was given to this effect, (ſcilicet) Edward Paſton was ſeiſed of the Manor of Bingham, parcel whereof was the Land in queſtion, grantable by Copy. And he by his Deed inented, in conſideration of a Mariage to be had between Tho. Paſton his Son, and the Daughter of I.S. covenanted with I.S. to ſtand ſeiſ'd of the Manor, to the uſe of his Son for life, and after to Mary the wife for life, the remainder to the firſt Son between them in tail, with divers remainders over. The Mariage was ſolemniſed, and they found moreover, that there was a Cuſtome, that the Lord might have liberty of fould courſe for 100 Sheep, throughout all the Copihold-land: lying in the Eaſt and North field, the Cuſtomary places and Lands in theſe Fields not being incloſed, from the Feaſt of St. Michael, to the Feaſt of the Annunciation, if the grain was carried in by that time; Or otherwiſe from the time of the carrying in to the Annunciation, if it be not ſowed with ſeed again, and that thoſe 15 acres in queſtion, be in the Corn-field. And that Thomas Paſton granted that Copihold to the Defendant in Fee, and that in 14 Iacobi, the Defendant encloſed the Land without Licence of the Lord, and if Licence was obtained then he ought to have paid a Fine which the Lord would have aſſeſt. And if any of the Tenents incloſe without Licence, they find, that they have uſed to be puniſht, and pay thoſe penalties, which the Lord would aſſeſs. And they alſo found, that that incloſer by the Copiholder, was with a Ditch of ſix foot in breadth, and 3 foot in depth, and that the land which he digged out, was but to make a Bank upon the Land, upon which a hedge of quick thorn was ſet, and that four gaps were left in the incloſure of nine feet in breadth. And they found that the Defendant did not at any time compound for a Fine. And then they find that the Copiholders which before this incloſed without Licence, were amerced, and commanded upon a pain, before a certain day to throw up their incloſures; And now for this incloſure Thomas enters for a forfeiture, and dies, his Wife makes a Leaſe of it, and the Defendant ejects the Leſſee,

ib. 3 Car. Com. Banc.

Atthowe held that he had forfeited his Copihold, for that incloſure is againſt the Cuſtome of the Manor, which is found. For the Cuſtome is the life and ſoul of a Copihold; as it is in the 4 Rep. 31. Brownes Caſe. The breaking of that is a forfeiture, and make the Copiholder have an Eſtate at will meerly, whereas before he had an Eſtate not meerly at the will of the ſaid Lord, but ſecundum volunt. domini. And ſo by the incloſure the Lord cannot have his ſould courſe, and ſo the cuſtome is broken. 42 Ed. 3. 25. For not doing the ſervices, the Lord may enter and have the Emblements. If a Copiholder makes a feoffment, it is a diſſeiſin; for which there may be an Aſsiſe of novel diſſeiſin de libero tenement of Lands, whereof the profits, or of the Rent iſſuing out of the Land there is a forfeiture. And Littleton ſaid, that a reſcous Replevin Encloſure, and denying the Rent is a Diſſeiſin. And what is a Diſſeiſin of a Freehold is a forfeiture of the Copihold. Reſcous by a Copiholder is a forfeiture, for all the books ſay, that a denial of a rent is a forfeiture. And it is held, that if a Copiholder brings a replevin, it is a forfeiture, and the Lord may enter preſently; But if he avow, then perchance he hath diſpenſed with it. And an incloſure is more ſtrong than a denial, 11 E. 3. Aſſiſe 88. cited in Taverners Caſe, 4 Rep. The heir cannot have an Aſsiſe before entry: but if the Defendant menaces him, or ſtops up the way, it is a Diſſeiſin, 14 Aſs. plac. 19. 8 E. 2. Aſ. 374. A ſtopping up of the way is a diſſeiſin; but if he can go another way, he can have nuſance 29 Aſs. 49. But it will be objected, that the Lord had another remedy: for he might have an Action of the Caſe And for that not enter for a forfeiture. But an Action of the Caſe does not reſtore him to the Freehold, but give dammages only. And if an Aſsiſe be brought, it affirms the Diſſeiſin, and makes forfeiture; and that agrees Taverners Caſe, That where ſeveral Copiholds were granted by one Copy, a rent denied of one, forfeits that and not the others. But admit it is a forfeiture, if the leaving the Gaps diſpence with it. And it ſeem'd that not; for he loſes the profit of the Fould-courſe, for 500 Sheep, would tear their fleeces by ſuch a narrow paſſage: and the incloſure is an impediment to hinder their ſpreading in their feeding; And ſo every one alſo may incloſe, and leave gaps: and the Lord perhaps, compell'd to put and remove the Sheep ten times in one day, and ſo the Sheep worſe at night than in the morning, &c.

Secondly, if the Lord had given Licence, then he would have had a Fine, but he would ſo be his own Carver. And the Lord had no remedy for a Fine upon admittance after Surrender, 4 Rep. 46. He had no remedy there by Action of debt, nor by Action of the Caſe, without promiſe to the Admittance, &c.

Lord grants a Copihold Eſcheat, he ought to improve his Fine before; or he hath no remedy; for he is not compelled to grant the Copihold again, and therefore he ſhall have what Fine he will. And it is not found alſo who may incloſe paying his Fine. A Lord admits a Copiholder for life with remainders; the admittance of Tenent for life, was the admittance of the remainder, but he ſhall have his Antefine, 4 Rep 23. And if they may incloſe paying a Fine; then the Lord had an Eſtate at the will of the Tenents.

Thirdly when it is found that the Lord amerced and commanded upon pain, &c. that is no mitigation or diſpenſation of the forfeiture. For ruinous Houſes pull'd down is a forfeiture, without Cuſtome to the contrary, Becauſe no waſte lies againſt a Copiholder, as againſt Leſſee for years, And yet the Lord in favour may amerce ſuch a Copiholder if he will; and that is no diſpenſation but an affirmation of the forfeiture. And ſo becauſe the Lords were conſcionable and would not take the forfeiture, that does not prove that it is a Diſpenſation.

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Fourthly, the making of the gap and hedge of that latitude, &c. is waſte, and ſor that a forfeiture. 22 H. 6. Waſte 46. There it is agreed, that if Land be digged to make a Bank, and if more be digged than is neceſſary, that is waſte, if it be not caſt down again, for the Land might be made barren. 41 E. 3. Waſte 82. There it is not waſte, for the Land is better than it was before; But it is not better if it be arable Land, for the Trees and Buſhes ſhadow the Sun from the Land. Dyer 361. And if none had been folded there, yet it ſhould not have been waſte. Fodder in Meadow is waſte: but there it was found by the ſpecial verdict, that the Land was imbetterd. If Leſſee for years does ſo, it is a forfeiture, 2 H. 6. 17. There it is ſaid; that permitting the Land to lye freſh is waſte; But thorny is no waſte, for the Leſs may grub the Thorns up, and it ſhall be better Land; wherefore he prayed Judgement for the Plaintiff. But Sergeant Henden argued for the Defendant; and conceived that in the whole cauſe pleaded, there is not any thing in it which makes a forfeiture. There are two things in it to make that incloſure and waſte, And firſt, That an Incloſure without Licence is not a forfeiture. *Paſch. 3. Car. Com. Banc.*

Firſt, every Act that makes a forfeiture of a Copphold ought to be a diſinheritance to the Lord, &c.

Secondly, a voluntary Act againſt the Cuſtome, &c.

Thirdly, in this Caſe there is not any Cuſtome found which makes a Forfeiture; And for that any Condition in Law is excluded: A Copiholder is in, tenens ſecundum conſuetudinem manerii, and therefore an Act that makes a forfeiture ought to be againſt Cuſtome, and a diſinheritance to the Lord of his Copphold; and not of a Collateral thing. As a Treſpaſs upon the Demeſns of the Lord is not a forfeiture, 21 H. 7. Kell. 77. 9 Rep. 76. Combes Caſe there has the ſame rule. The Cuſtome hires his Eſtate ſo long as the Tenent does the ſervices, and obſerves the Cuſtomes. Hill. 16 Iac. Com. Banc. rot. 335. Brettyes Caſe. Two Copholders are, and one releaſe to the other, is no forfeiture. Dyer 321. One part of the Services there was to make Preſentments, and if he refuſe it is a Forfeiture. If a Copholder fell Trees it is no Forfeiture, becauſe it may be for the reparation of Houſes. But an Act afterwards, as ſelling them, may cauſe a Forfeiture, 9 H. 4. Waſte 39. A Copphold is not forfeited by Outlawry in a perſonal Action; for the Lord is not prejudiced by that; And yet the King ſhall have the profits, by which the Lord is eſtranged from the Tenement, 5 H. 5. 2. New Book of Entries, 228. Hill. 4 Iac. rot. 172. Com. Banc. in the end of the Caſe reſolution is to this purpoſe. If Copholder be ſummoned to the Court, by common Proclamation or expreſs notice, and he does not appear, it is no Forfeiture. Becauſe it is but a failer of Services, and no denfall; And for that neglect he may be puniſht and fined.

Secondly, it was reſolved, that non-payment of the rent, although it be a failer of Services, or if he had ſaid he could not now pay it, is not a Forfeiture; But to forge new Cuſtomes is a Forfeiture, for that tends to the diſinheriting of the Lord, Dyer 228. The Caſe of payment of a Fine which admits the diverſity appears Cook lib 1. 4 28. Now this incloſure is not a Diſinheritance, or a voluntary Act to eſtrange him from his Lord. And then the Cuſtome ought to make that a Forfeiture which is not ſo found. And it was a rule in P. 19 Iac. That a bare Incloſure is not a Forfeiture of a Copphold. And then it is found, that he ſhall not incloſe without Licence. But it is not found, that if he ſhould incloſe without Licence, it ſhould be a forfeiture. And there is neither expreſs nor tacite condition that it ſhould be a Forfeiture. And then it is found that he may amerce and command that the Hedge ſhould be pulled down upon pain, &c. The intention is not that he had two remedies;

Paſch. 3. Car. Com. Banc.

And it is not to be found in our Books, that one Act cauſes a pain, and a forfeiture alſo. And ſo the cuſtom ſhall be taken favourably for the Copyholder, and ſtrictly for the Lord; for a forfeiture is odious in Law. 4. Rep. 9. There the Cuſtom is found, that not appearing at four Summons is expreſſy a forfeiture. And to the objection that is made, that he had not any remedy for his Fine; the Verdict anſwers that, that he may put a pain upon him.

Secondly, he encloſes, and leaves three gaps: It was objected, that an Encloſure was a diſſeiſin, ergo a forfeiture. In ſome Caſes that Encloſures ſhall be diſſeiſins there is no queſtion: But there is, if they be Encloſures with gaps. The Encloſure that deprives him of all his remedy is a diſſeiſin in Rent, but otherwiſe not. For Littleton ſays, if he encloſe, that he cannot diſtrein: I conceive this diverſity. If a Copy-holder makes a diſſeiſin of any thing appertaining to the Copy-hold, it is a forfeiture; for then he doth an act that eſtranges the Lord from his Tenant; but if the Lord had any profit accrewing out of the Copy-hold, and he diſſeiſeth him of that, Whether you will make that a forfeiture? As if the Lord had herbage out of the Copy-hold, a diſſeiſin of that is not a forfeiture, unleſs it be particularly by Copy of the Grant. The making of the Ditch is objected to be waſte, and therefore a forfeiture: I agree if it be waſte, it is a forfeiture. It is not a forfeiture, if a Copy-holder dig a Marle-pit and Marles his Land; for the Land is imbettered by it. It is objected, that it is a forfeiture at Common Law, 22 H. 6. 41 E. 3. waſte 621. If Leſſee for years plough a Meadow it is not Waſte, for it tends to a matter of Husbandry. Natura Brev. title waſte. Dyer 361. pl. 12. Leſſee for years converts Land to Hop ground: It was the opinion of Popham Lord Chief Juſtice, 30. Eliz. that it was not waſte. And for that that the Land by this Encloſure is imbettered, it is not waſte, and the Lord had no prejudice, becauſe the gaps were left. And the Court ſaid, that it is to be preſumed, that all the Land was imbettered by this Encloſure, if it be not expreſly ſhewed to the contrary. Sed adjournatur, &c.

Ralph Marſhes *Caſe again.*

Athome ſaid, that the conſideration alſo is good, and there is a double conſideration of the Premiſes. For ſhe promiſed to pay that debt, part at Mich. &c. So there was a day given, or it was due preſently: And that is the conſideration: Crook ſaid, that it is no conſideration. For it is not expreſſed that he ſhewed the account: But that they ſurveyed it, which is not but an implication that he ſhewed it: And he ſaid that he intended to ſue him, and then he in conſideration of the Premiſes &c. Which was a thing executed before the obligee ſhewed the obligation to the Obliger, that in conſideration of that promiſe to pay the debt is not a good conſideration. In conſideration that the Teſtator is indebted, &c. I will pay at two days, is not a conſideration. But in conſideration that the Teſtator was indebted, and you will forbear, is a good conſideration. That you will forbear paululum temporis, is not a good conſideration, without expreſſing for a day, or &c. as it is adjudged, &c. Richardſon in conſideration that the Teſtator was indebted, is not a good conſideration: And then in conſideration that he made appear that the debt is due, is not good; for he ought to do that before it can be paid: But more after, &c.

Abree

Abree *againſt* Page. p. 15

ABree brought an Action againſt Page, who pleads that the Plaintiff had releaſed to him after the Obligation made, upon which Debt is brought: All and all manner of Errors, and all manner of Actions, Suits, and Writs of Error whatſoever, which the ſaid John for any matter or thing, &c. And I the ſaid John am by theſe preſents excluded of Writs or Suits, Actions of Error, or Suits againſt him the ſaid, &c. Upon which the Plaintiff demurred. Amburſt ſaid, that the Action is barred. The pretence is that that Releaſe extends only to Errors. Littleton ſaid, the Obligation makes the Duty preſently; And a Releaſe of all Actions ſhall bar him. 8 Rep. Althams Caſe. And Bullocks Caſe, an Obligation ſhall be taken more ſtrongly againſt him that makes it. 19 H. 6. 42. Two have Goods in Joynture, and give all their Goods: their ſeveral Goods paſs alſo. And if two grant rent, their ſeveral rents paſs alſo, according to their ſeveral Intereſts; And then he ſaid it ſhould be a bar of all Actions and Suits, and that amounts to a Releaſe. 21 H. 6. 51 H. 6. one was bound to ſave a Sheriff harmleſs againſt I. S. And he pleads that he was taken by a Capias, and made an Obligation, and that he kept his day; And that was adjudged a good Plea: Which ſhews, that words not formal may bar an Action, &c. Richardſon ſaid, If the Releaſe be of Actions and Suits Subſtantive, no queſtion but Debt is barred, and that Deeds (he granted) ſhould be taken more ſtrongly againſt him that makes them. He agreed to the Caſes put by Amburſt. But more after, &c. *Paſch. 3 Car. 3 Rot. 274 Com. Banc.*

Bowett, *and* Langhams Caſe.

ELlen Bowett procured a Corpus cum Cauſa out of the Common Pleas to the Sheriff of London; who returns that ſhe was impriſoned upon a Suite againſt her by George Langham as a Feme ſole Merchant according to the Cuſtome there. Now the Truth was, that her Husband being a Vintener was preſt by the King to be a Souldier: and goes over-Sea. The Feme afterwards takes an Houſe, and buys Wine of Langham, who truſted her, ſuppoſing ſhe was a Feme ſole Merchant. Afterwards the Husband returns, and the Wife denies to pay for the Wine: and the doubt was if the Feme was a ſole Feme Merchant by the Cuſtome ſo, or not: and the words of the Cuſtome were read. That where the Wife meddles in a Trade, in which the Husband may meddle nothing, ſhe ſhall have all advantages, and ſhall be ſued as a Feme ſole Merchant, &c. But by Richardſon and Yelverton, Shee is not a Feme ſole Merchant within the Cuſtome; For her Husband exerciſes himſelf the ſame Trade. And a Feme ſole Merchant by Yelverton ought to be the Widow of a Tradeſman who takes a ſecond Husband, and afterwards exerciſes the Trade of the firſt Husband.

Secondly ſhe ought to be a Feme Covert, and not a Virgin or Maiden.

Thirdly, ſhe ought to be of another Trade than that which her ſecond Husband was: For if ſhe may exerciſe the ſame Trade of her Husband when he is over the Sea: the Husband may go over Sea and return within a year, and then ſhe is a Feme Covert, &c. And ſo make her a Feme Sole or Covert at his pleaſure. And Richardſon and Yelverton ſaid, that that would be a prejudice to all the Wives in London, ſo that they would never be freed from impriſonment. But Crook, Hutton, and Harvey to the contrary. And they ſaid that if the Husband meddle with the Trade

of

Paſc. 3 Car. Com. Banc.

of his Wife, then ſhe is not chargeable as a Feme ſole Merchant; But if the Husband be over Sea, or become Bankrupt or relinquiſh his Trade, and the Wife exerciſeth the ſame Trade, or they both exerciſe the ſame Trade diſtinctly by themſelves, and not meddle the one with the other, ſhe is a ſole Merchant; or otherwiſe it would be a great inconvenience. For the Wife when her Husband is over Sea, would contract and gain much Goods of others into her hands, and the parties ſhall not have any remedy. But Richardſon ſaid, that he who ſells ought to take notice, whether ſhe be Feme Covert, or feme ſole Merchant by the Cuſtome or not, his peril.

Ayliffes Caſe.

AN Action of battery was brought againſt Ayliffe and his Wife, for a Battery done by the Wife upon the Plaintiff. And the pleading was, that the Baron and Feme came and defended the force and wrong, &c. And the Baron for his ſaid Wife ſays, that ſhe is not guilty; And upon that the Iſſue was joyned, and found for the Plaintiff againſt him, And in arreſt of Judgement, it was awarded that the Iſſue was ill joyned; For the Wife there pleads nothing. So there was nothing done at that time with the Suite.

Tayler againſt Philips.

TAyler, and Margaret his Wife exhibit a Bill in the Council of Marches againſt Phillips and his Wife; For that the Wife of Philips had ſent a ſcandalous Letter to the Wife of Tayler: And the Letter was written to this effect (ut ſequitur): Mrs. Tayler, I have often heard of your clamorous tongue, whereas if you want matter againſt your Enemies, you exclaim of your Friends, and give out, that I am jealous of my Husband with Mrs. Anne: he was never ſo preciſe to take on him to be aſhamed how he liked the Border of a Womans Pettycoat; and you being not able to throw the firſt Stone at him, need not to have been one of his Accuſors; Neither know I what he can be accuſed of, unleſs it were, for being in your Chamber before you were up: Which I never heard was prohibited to any, neither know I why it ſhould be to him. You may challenge me for a Coward, that I meet you not at the Croſſe, as you have challenged others, having been a Pupill in the School of Scoulding, and a rare Artiſt therein, But I durſt not have done it, leſt I ſhould have been ſo hoarſe, that it might have have been ſaid, I had the Pox. And the Court proceeded to the hearing of the matter, and ſentenced the Defendant to be impriſoned; and fined 40 l. to the King, and 40 l. dammages to the Party. And Sergeant Henden moved for a Prohibition for that, that their Inſtructions are, Whereas there be divers Books, News, and Tales ſpread abroad, and Libells made, by which the Subjects are abuſed, and the Peace may be broken, you ſhall proceed againſt ſuch Perſons, till the Authors be found out, and they be puniſhed by fines, impriſonments, papers ſet on their breaſts, and the like. And he ſaid that thoſe words are not accomtable at Common-law; and therefore are not as they ſeem within their Inſtructions. But admit that, yet they have not power to give dammages to the Party. Richardſon ſaid, In the Star-Chamber, libellous Letters, that are ſpitefull and ſcandalous to defame any, although that they bear not an Action at Common-law; yet they are puniſhable there, and alſo they give dammages to the Party wronged; But there is difference between the Star-Chamber and that, &c. Henden ſaid, that Magna Charta makes the difference. Quod nullus liber homo capietur aut impriſonetur niſi ſecundum legem terræ. So by the Common

law

Law and their inſtructions, they have not power to give damages to the party. Richardſon chief Juſtice, ſaid that no prohibition ſhould be granted, for the Fine of the King; for they have power in that Caſe without queſtion, and to the puniſhing in that matter. And if they err in Judgement for the Libellous Letter, and adjudge it to be Libellous where it is not, We cannot award a prohibition, nor grant error. But for the damages, that Court differs from the Star-chamber: for the Star-chamber had its power by its ſelf, and differs from the Common Law; But that Court is by Commiſſion, and therefore they ought to follow their Inſtructions. And therefore a prohibition as to the damages ſhall be granted. And Yelverton alſo was of the ſame opinion; but he ſaid, there was another clauſe in their Inſtructions; And for that a prohibition, as to the damages ſhall be granted. Hutton and Harvey ſaid, That if the ſute was by information, than it is clear that damages cannot be given. But it is by Bill, ſo in nature of an Action; as I conceive, which concludes, that they were damnified. But it is now brought too late to grant a prohibition, where the parties have admitted the action: But a day was given to ſhew cauſe, why a prohibition ſhould not be granted quoad the damages. And ſo they concluded for that time. *Paſch. 3 Car. Com. Banc.*

Note, that it was ſaid by the Court: That if money be lent upon Intereſt, and the Scrivener who makes the Obligation, reſerves more then 8 l. in the 100. l. That, that is not an uſurious Contract. See the cauſe, &c.

Eaton and Morriss Caſe.

FAton and Morris being reputed Churchwardens (but they) never took any Oath, as the Office requires, preſent a Feme Covert upon a Common report for Adulterey, &c. And the husband and wife Libel againſt them in the Eccleſiaſtical Court for that defamation. And when ſentence was taken, and ready to be given for them, the Churchwardens appeal to the Arches: and for that, that that preſentment cannot be proved but by one witneſs, they ſentenced the Baron and Feme. And now Ward who that term was made a Serjeant by a ſpecial call, moved for a prohibition: but it was denied by the Court; for they were Plaintiffs firſt. And alſo it is a cauſe which this Court had not any Conuſance of.

Marſhes Caſe before.

MOre of Marſhes Caſe which is before.

Richardſon, Hutton, Harvey and Yelverton ſaid, That the conſideration alſo is good. For although that it be not expreſſed that the Plaintiff himſelf ſhewed the accounts; yet it appears fully, that they were upon the requeſt of the wife viewed. And it ſhall be intended by Common preſumption that the Plaintiff himſelf ſhewed them, for he had the cuſtody of them, and is owner of them. And the Books of Merchants are their ſecrets and treaſure: and they will not ſhew them by their good will. Now it is not like to the caſe of an Obligation; for there the certainty of the debt was before, and he was compellable to ſhew it. But the certainty here cannot appear without great ſearch and labour, and there can be no compulſion to ſhew their Books. And by Hutton Juſtice: There is no queſtion, but, if the promiſe had been made after the Sute commenced, it had been good. No queſtion by Richardſon, and it is agreed by all, That if the Defendent had required the Books to be brought to his houſe, or to another place, it ſhould have been good: And there is not any difference, although the Books were ſhewen in the ſhop by the ſervant; for he permitted

Paſch. 3. Car. Com. Banc.

mitted his Books to be viewed, &c. And Yelverton ſaid, that Beechers Caſe and Banes Caſe is more infirm than this Caſe is: And yet adjudged there to be good. And ſo it was awarded that Judgement ſhould be entred for the Plaintiff: Si non, &c.

Of a Communication of Marriage.

A Communication between I.S. and A. was of the Marriage of I S. being poſſeſſed of a term for years, and of certain goods, promiſed to A. that if ſhe would be married to him, and they had iſſue a ſon, that he ſhould have the term: If a Female, that ſhe ſhould have the moyetie of the goods. And after they intermarry, and have iſſue B. a daughter. The husband dies, and B. brings an action upon the Caſe againſt the Adminiſtrator of I.S. By the Court, ſhe cannot bring the action, unleſs as Adminiſtratrix of A. or in the name of A. And the Caſe of Stafford was recited. Where there was a Communication between Stafford and a woman; That if ſhe would marry with him, that Stafford would leave her at his death 100.l. And after the intermarriage and death of the husband, in an action brought by the wife, the queſtion was, whether the promiſe was extinguiſht by the intermarriage. And after grand diſputes, it was reſolved, that the intermarriage was but a ſuſpenſion of the promiſe. And ſo it was concluded.

Hill. 17. Jac. 26
1 Ro. A. 343
Palm. 99. 2 Cr. 571
2 Ro. R. 162. 3 Ch. 117
2 Cr. 58. 59

Kitton againſt Walters.

Kitton brought debt upon the Statute of 5. Eliz. cap. 9. for Perjury, againſt Walters, for an Action of Treſpaſs, for Battery was brought againſt him by I.S. and he pleaded not guilty, and that the Defendant was brought as a witneſs: And that he falſely and corruptedly depoſed, and did not ſpeak voluntarily, that the Plaintiff in the Treſpaſs was wounded and beaten, &c. And that he could not labour for half a year, &c. And upon the general iſſue pleaded, it was found for the Plaintiff; and Hendon moved to have Judgement. But it was objected, that the party grieved ſhall not have that Action; for that he did not ſay, voluntarie depoſuit, &c. For although that he falſly depoſed, wherein voluntary is not, but a concluſion, and voluntas ought to be in the premiſſes: and corruptive does not include that; and ſo was the opinion of the whole Court. And it was awarded, that the Plaintiff, nil capiat per breve.

Cr. El. 201. 147. 2 Cr. 508
Sav. 43. 2 Leo. 211
3 Leo. 230. 1 Sh. 190
2 Sh. 2.

A ſervant of a Bayliffs Caſe.

IT was awarded by the Court, that where a Servant of a Bayliff of a Franchiſe was ſworn to ſerve a Proceſs, and by deputation from the Bayliff, he ought not to have ſerved a Proceſs, but to ſuch a ſum: And he ſerves a Proceſs of a greater ſum without any warrant, and after levies the money, and parts with it: That the Bayliff ſhall be chargeable, Quod nota.

Beare againſt Hodge.

BEare was Plaintiff againſt Hodge for taking of his Cattel. The Defendent was known as Bayliff to Thomas Wiſe, who was ſeiſed of twenty acres, &c. (whereof the Land in queſtion was parcel) in Fee. And that it was Leaſed to Harris for 99. years, if he and his two ſons ſhould ſo long live, and rendring a Rent at the four uſual Terms in the year; and the beſt beaſt at the death of every one of the three in the name of an Herriot, or 5.l. at the election of the Leſſor. And now for Rent

arrear

arrear at Michaelmas, and for an Heriot after the death of Harris, he avowed, &c. The Plaintiff confeſſes the Leaſe and reſervation, and as to the Heriot, he demurred. But for the Rent he ſaid, that he tendered the Rent upon the Land toward the latter time of Michaelmas day: and that none was there to receive it. And that afterwards he tendered it to the Leſſor himſelf, out of the Land, and he refuſed it; And that after that time no demand was made; but that he, after the tender alwaies was and yet is Tenent, &c. and brings the mony into Court; And upon that he demurred. Henden ſaid, The Avowant may diſtrein without any new demand; and that Caſe had been adjudged in this Court before. For although that the Rent be tendered, yet it remains due notwithſtanding; and then he is able to diſtrain. 15 Iac. in this Court, rot. 710. Crowley brought a Replevin againſt Kingsmill, who avowed, For that the Plaintiff held of him by Fealty and 10 s. rent. And for the Rent he diſtreyned the Plaintiff. And that at the day he tendered the rent upon the land, & none was there to receive it, as it is ſaid, &c. And upon debate it was adjudged, that he may diſtrein without demand. 7 rep. 29. Maunds caſe, you may ſee that a Rent-ſeck ſhall not be diſtreined after tender without demand; For if by his demand he is intituled to his Action, then there ought to be a new Demand, 21 E 4. 17. 7 E 4. 40. 20 H. 6. 1. cited in Pilkintons Caſe. If you will be excuſ'd of the Diſtreſs; there ought to be a tender of the Arrerages at the time of the Diſtreſs. Richardſon, Hutton' and Harvey all agree, That the Diſtreſs is good to have the Rent, but not to recover Dammages; becauſe he does not all he might do. And Richardſon ſaid, That 2 H. 6. 10 H. 6. 20 E. 4. 10 E. 4. and the Caſe in the Aſſiſe, and the whole current of Books was to the ſame purpoſe. Harvey Juſtice ſaid, that if a tender be upon an Obligation at the day, he ſaves the penalty; but if another Demand be afterwards, and he refuſes to pay: he cannot plead unque priſt. And Juſtice Crook cited a Caſe in the Kings Bench 16 Eliz. between Cropp and Hambleton, where a Rent upon a Leaſe was reſerved to be paid at Michaelmas. And if by forty daies after, &c. And in the mean time, after the firſt and before the laſt, the Leſſee tenders to the Leſſor himſelf. And adjudged that it ſaves the Forfeiture. For it is for his eaſe, that he ought to tender upon the Land. And by the ſame reaſon alſo, when he hath tendered it to the Perſon himſelf, and ſaid that it is uncore priſt. and will demur upon that, and not take advantage of his non-tender at the Diſtreſs: the Dammages are ſaved. But Yelverton was againſt that. For it is agreed, that a Diſtreſs is locall, ſo then we cannot ſever Dammages, when the Law hath coupled them, and made incident to the Diſtreſs. Sed adjournatur, &c.

Paſch. 3 Car. Com. Banc.

Tithes.

One libells for Tithes of Fiſh which is due meerly by Cuſtome. And the Defendant pleads, that time out of mind, &c. they have paid no Tithes of that. And Henden Sergeant moved for a Prohibition. And Richardſon replyed and ſaid, it is meerly a Cuſtomary Tithe, as Rabbits, &c. Whereof no Tithes are due by the law of the Land, and a Prohibition ſhall not be granted. But all the other Juſtices affirmed, that there ſhall be a Prohibition granted; becauſe that the Cuſtome ought to be tryed by the Common law, and they make a difference between modus decimandi which is alſo Cuſtomary, and where there is a Tithe precedent due, and that modus converts it into another Duty. There no Prohibition ſhall be granted. But it ſhall be tryed in the ſpiritual Court, whether there be ſuch a modus decimandi, or not, And that Caſe in the Cuſtome makes the Duty it ſelf. But he alleged the modus to be for two pence, and the Parſon for three pence, ſhall be tryed by the Com-

Paſch. 3 Car. Com. Banc.

mon law. And they ſaid, that ſo was the opinion in the grand Caſe, of lead ore. And Hutton ſaid, that ſo it was determined in the Caſe of one Berry, for tithes of Limekills; which are as Minerals, and are not tithable by the Common law. But when the Cuſtome is tryed then they in the Eccleſiaſtical Court may proceed upon it.

Hartop and Tucke againſt Dalby.

HArtop and Tucke brought a Quare impedit againſt Dalby as Incumbent, and the Iſſue between them was, Whether the Church of Eſſenden was appendent to the Mannor of Eſſenden, or in groſs. And the Plaintiff to prove the Appendancy, gave in evidence, that H. 6. ſeiſed of the Mannor and Advowſon, grants to Margaret his Wife the ſaid Mannor habendum una cum advocatione for her Joynture, &c. It was ſaid that if the advowſon was in groſs, it could not paſs ſo, not named in the Premiſes. But of an advowſon appendent otherwiſe it is. As it was agreed in 38 H. 6. 36. Abbeſs of Syons Caſe, which was granted by the whole Court. Henden to diſprove that evidence, alleged, That the Advowſon being made any time in groſs, It can never be appendent again. And he ſhewed alſo how H. 3. was ſeiſed of that Mannor with the Advowſon, and that he granted the Mannor to I. S. for life, excepta advocatione. By which Grant it ſeem'd to him, that it became in groſs. And ſaid that the Judgement of the Caſe in 38 H. 8. 38. was for that cauſe, and that they did not ever find it contradicted. And ſo totis viribus he maintained that to be in groſs, But all the Juſtices were againſt him, And that that is not but a diſappendency pro quodam tempore. And ſo was the better opinions in 38 H. 6. as the Caſe is in Dyer 33 H. 8. 48. 6. of a Villain. If the King grants the Demeſns of a Mannor for life; After the death of the Leſſee, it is a Mannor again. And if an advowſon appendent be granted for life; After the Leſſee it becomes an Appendent again. And ſo if a Mannor with the Advowſon deſcend to two Copartners; And the Advowſon is allotted to one, and the Mannor to the other. If there the Siſter who hath the Advowſon die without Iſſue: it is then appendant; and yet there was a ſeverance in perpetuity. And Yelverton went to the Juſtices of the Kings Bench to have their opinions. And they all agreed, that it was but a temporal diſappendency during the life, without doubt. Bramſton ſaid, the Mannor is granted and the Advowſon by E. 6. to the Lord Saint Iohn, to be held by ſeveral tenures, The Mannor in Chivalry, and the Advowſon in ſoccage, which is a ſtrong preſumption, that the Advowſon was in groſs. But the Juſtices agreed, that there may be ſeveral Services, and yet the Mannor and the Advowſon not ſevered. And a Mannor may be granted, parcel to be held by one Tenure, and parcel to be held by an other Tenure, and yet remain intire. And afterwards verdict was given for the Plaintiff, &c.

Viner and his Wife againſt Lawſon.

VIner and his Wife libells againſt Lawſon in the Councell of York, for a promiſe to pay 600 l. to the Wife, for her Mariage,

And

And ſuggeſted that they could not preciſely prove it by one witneſs, that they might have remedy at the Common Law. But Lawſon denyed the promiſe upon his Oath: and yet they proceeded, and Lawſon prayed a prohibition, and it was granted. For if it may be proved by ſome witneſſes then it is tryable by an Action of the Caſe, &c. And ſo the Juriſdiction of the Common Law is ouſted. Paſch. 3 Car. Com. Banc.

Abrees Caſe.

More of the Caſe which you ſaw before, &c. Henden argued that that releaſe is but ſpecial, and that it extends only to errors. And firſt, for that the intention of the parties is principally to be regarded. And ex præcedentibus & conſequentibus optima fit interpretatio. The precedent clauſe is only a releaſe of errors, and then the conſequent ſuits: And in the laſt clauſe, releaſe all Actions, and ſuits of error before. 3 Law. 274

Secondly, a releaſe is particular, and may be by inference of other words have a general ſenſe; yet particular conſtruction ſhall be made, Niſi impediatur ſententia or intentio partium: For that alſo *Suits* in the middle of the clauſe ſhall have relation to the other words. And to that purpoſe is, 28 H.8. Dyer 19. A Grant to the Leſſee, that he ſhall have the Rues for hedges (by the aſsignment of the Bayliff of the Leſſor) and for neceſſary fuel to burn. And the opinion of the Court was that he ſhould have the fewel alſo by aſsignment, 9 E. 4. 43.6. A man ſubmits himſelf to the Arbitrament of I.S. de omnibus actionibus perſonalibus ſectis & querelis. And it was ruled that that word perſonal refers to all. And the Caſe in queſtion is the very Caſe as that in reaſon, 10 H.7.8. A man grants the Cuſtody of his Park, and all the Windfalls, &c. And it ſeemed there, that the grant of Windfalls is abſolute: for that, that the intent cannot be otherwiſe, Paſc. 36 Eliz. banc. Roy. Between Pidgeon and Gibſon, Norff. The Caſe upon the ſpecial verdict was in Treſpaſs: and Pidgeon the Father makes a feoffment to his younger ſon, by which he grants thus, Omnia illa meſſuagia mea & tenements in East Bockham, that late were Patris mei, and ſince in the Tenure of N. D. and C. And it was adjudged, that that land did not paſs by that Feoffment. For where particular words are in the end, the middle ſhall never be taken general. And ſo alſo 8. rep. 150. Altham's Caſe. There it was reſolved, that where it had particular words, there all ſhall be of the ſame nature, &c.

Thirdly, expende circumſtantias & intentio nihil intelligetur, which may be intended alſo in Suits more than in actibus: For will you have Action particular, and Suits generale. And ſo the intention appears in the firſt word Errors, and the ſubſequent are but declaratory: And although that Suits is laſtly put in the ſecond Clauſe, yet there it is not but a ſurpluſage; And that which is not releaſed by the firſt (Suit) cannot be by the ſecond: For it is not but a repetition of that which was before. Richardſon, the words are, All Writs, Actions and Suits by error. Without queſtion it ſhall be intended but errors: Or if it be ſo: And all Actions and Suits of error, It cannot extend but to errors. Hutton. In that releaſe there is not any word of debt; and therefore it ſeemed that the intention was not to releaſe other actions, but errors. And it was adjudged in this Court in a Writ of Annuity. A releaſe was pleaded that the Plaintiff acquitted him, of one payment, for half of the year, and releaſed to him all Actions, Suits and Demands; And adjudged, that that releaſe does not bar him, but of the arrearages of a year.

Paſc. 3 Car. Com. Banc.

A Quid juris clamat.

IN a Quid juris clamat, The Tenant was adjudged to Attourne. And the queſtion was, whether he might Attourne without being ſworn in Court to do fealty to his Lord. And Brownlow, chief Prothonotary ſaid, That all the Preſidents are, that he ſhall Attourne and do fealty, by which the Tenant was ſworn to do fealty: and the fealty was taken for an Authority.

Beare and Hodges Caſe.

MOre of Beare and Hodges Caſe, you may ſee before. Davenport ſaid, that a man cannot diſtrein upon an actual demand, which ought to be to the perſon, upon the Land. And for that, the diſtreſs is tortious, and damages by the Common Law are given to him, who made the Replevin; But to the Avowant damages are only given by the ſtatute of 7. H. 8. cap. 4. 21 H. 8, 19. Now the Rent is not in queſtion (for it was taken to pay it) but the dammages: and the Tenant had done all that he can: and it is not reaſon that he pay any damages. And the diverſity between a Replevin, and debt for Rent after ſuch a tender. That a local tender excuſes the damages, appears H. 4. 4. Tidthorps Caſe, 38. E. 3. 13. Debt. An Obligation is indorſed, to pay the money at Eaſter: and he tenders it at the day to the Obligee, who refuſes it becauſe he lives at another place. And now becauſe that no place was named for the payment, the tender was good, and ſhall excuſe him (without any other demand) of the damages. Littleton ſaid, that a tender of Homage excuſes, until a new demand, 21 E. 44. And there a difference ſeemed to ſome, between fealty and homage. But Bryan ſaid, that a tender of fealty alſo (until a new requeſt) to his perſon, excuſes damages: becauſe that fealty may be done by Attourney, 22 H. 6. 31. 7 E. 4. 4. puts the caſe of Rent to the ſame intent. Cook, Littleton, 7. 28. Maunds Caſe. The third reſolution is a ground for our Caſe. There it is ſaid, if Terre-tenant tender a Rent ſeck, upon the Land: The Grantee cannot demand it upon the Land in the abſence of the tenant: that it ought to be to the perſon upon the land: For what can the tenant do more than he hath done already. And the Statute of Weſtminſter 2. cap. 9. gives eaſe to the Tenant, When the Lord diſtreins immoderately and unneceſſarily. For an immoderate diſtreſs may be the ruine of a tenant: And therefore the Statute ſays, Nec habeat Capitalis dominus poteſtatem diſtringendi tenentes in dominico ſuo, dum prædict. Tenens offerat ei ſervitia debita & conſueta. 30. Aſſ. Fitzher. N. B. 69. G. If Cattel be diſtreined damageſeaſant, and tender of ſufficient amends is made, The Diſtreiner is liable to damages for the detinue, although not for the diſtreſs. And to the ſame purpoſe is, Cook lib. 8. 140. Carpenters Caſe, 5. rep. 76. Pilkintons Caſe, &c. The ſecond queſtion is, whether a Bayliff, without command of the Lord, (when he had refuſed to take the Rent upon a Lawfull tender) may diſtrein: And it ſeemed that he cannot. And the ſecond reſolution in Pilkintons Caſe came to that queſtion: That a tender of amends to a Bayliff amounts to nothing: And the queſtion upon a Herriot is, Whether the Lord may diſtrein without declaring his election; and it ſeemed that he cannot: For that is no Heriot which may be ſeized; As the Caſe in one Woodland and Mankles Caſe, there it is certain. And becauſe the Law veſts it in him immediatly after the death of the tenant. But ſo it is arbitrable, and cannot veſt before Election: and alſo the Tenant does not know which he ought to provide before, and declares his election. And if was demanded, for that it is not reaſonable that he ſhall be lyable to a diſtreſs,

diſtreſs, and cannot by any poſsibility prevent it, 2 Rep. 36. Sir Rowland Howards Caſe. I cannot finde any preſident where an Avowry is made upon a diſjunctive reſervation, without allegation that he had declared his Election. Although that the Leſſor in that Caſe may diſtrein without declaring his election, yet the Bayliff cannot: for he cannot juſtifie as Bayliff for an Arbitrable thing, without expreſs command. Acceptance of Rent by a Bayliff cannot alter the Tenancy. For although that he had power in Law to receive the Rent; yet he cannot by Law alter the Tenency, by his acceptance, without the Lords Command, Dyer 222. A Bayliff may demand Rent, but cannot enter for non-payment without expreſs command: And when he avows, he cannot avow any thing, which doth not appertain to his office. And for that, that it is an arbitrable thing, which cannot be transferred from the perſon of the Leſſor his Heirs or Aſsigns, that diſtreſs is well taken, &c. *Paſch. 3. Car. Com. Banc.*

If a Writ of Error was brought in this Court, and the day of the return is long, to delay the party, as if it be more than the next Term, the Court may award Execution, quod nota, &c.

Gammons Caſe.

One was obliged in the Eccleſiaſtical Court not to accompany with ſuch a woman, unleſs to Church or a Market overt. And afterwards he was ſummoned to the Eccleſiaſtical Court, to ſay, whether he had broken his Obligation or not: And Ayliffe moved for a prohibition, which was granted. For that that the forfeiture is a temporal thing; And it does not become them in the Eccleſiaſtical Court, to draw a man in examination for breaking of Obligations, or for offences againſt Statutes.

Dame Chichley againſt Biſhop of Ely.

Dame Dorothy Chichley brought a Quare impedit againſt the Biſhop of Ely and Marmaduke Thomſon: And declared that Thomas Chichley was ſeized of the Advowſon of the Church of Whiple in Cambridgeſhire, And preſented Marſhall, and died ſeized, and the Advowſon deſcended to Thomas his ſon, who by Indenture granted it to Eaſt and Angel, and to their uſe, and the uſe of the Plaintiff for life. And he being ſeized of the Church, it became void, &c. But Thompſon pleads that he is Parſon imparſonee ex præſentatione of the King. And confeſſed that he was ſeized as aforeſaid; but that he was ſeized alſo of other Lands in Capite, and dyed, and that his ſon Thomas was, and now is within age, which is found by Office. And ſo the King by his Letters Patents after avoydance preſents Thompſon, who was inſtituted and inducted: Abſque hoc, that Thomas Chichley granted by his Indenture to the uſe of his wife, &c. And the Plaintiff replies null tell record: Upon which the Defendant demurs. Atthowe for the Defendant: Although the Plaintiff may have a Writ to the Biſhop when his Title is traverſed. And admit there be no Inquiſition, yet the King may preſent before Office found, 20 E. 4. 11. An Advowſon being void is not but a Chattel, and for that it is veſted in the King without any Office. And you may ſee many Caſes to that purpoſe. Richardſon ſaid, If it be not by the Statute, 32 H 8. The King may grant Wardſhip of Land before Office. Atthowe. Alſo there is Traverſe upon Traverſe, which ſhould not be. Hendon argued for the Plaintiff: And he ſays he is Parſona imparſonata, and does not ſay, before the purchaſe of the Writ. For the Incumbent by the Statute of 25 E 3. cap. 7. cannot plead unleſs he be Incumbent ante diem impetrationis brevis, unleſſe he be Incumbent pendente lite he cannot

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not plead, &c. Hutton. If one be preſented, inſtituted, and admitted before the Writ, and inducted after and before his Pleader, he may plead well. And it was reſolved by the whole Court, That the pleading of the Parſon was good, without the words, Ante diem impetrationis brevis: And that all the Preſidents are according to that. But more afterwards, &c.

Alice Readngs Caſe.

ALice Reading brought an Action upon the Caſe againſt I.S. And declared whereas ſhe was a Maiden, and had many Suitors, the ſaid I.S. ſaid, That *Alice Reading* was with childe, and did take Phyſick to kill the Child. Upon which words, divers men refuſed her. And upon not guilty pleaded, it was found for the Plaintiff. Finch Recorder moved, that thoſe words were not actionable; For that, that it is not ſaid preciſely, that ſhe took Phyſick to kill the childe; and that the Phyſick might have ſuch an operation without her deſire or purpoſe: and alſo there is not any Suitor in ſpecial named; And as it is in Anne Davyes Caſe, 4 Rep. 16. 6. where it ought to be proved preciſely to the Jury, that ſuch a one was Suitor, and refuſed her. But here there was no ſuch proof. And he alleged in the Caſe of Sell which was adjudged. Where one declares that he endeavoured to marry a Woman, and that ſhe refuſed him, upon ſlanderous words. And it was adjudged againſt him; For that, that a Conatus is not ſufficient, but yet Judgement was given for the Plaintiff, without any reaſon alleged. Cook lib. 4. 16. 6. The Lady Cockins Caſe.

The Caſe of a Recuſant convict.

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Manſer

Trin. 3 Car. Com. Banc.

Manſer againſt Lewes.

MAnſer brought debt againſt Lewes the Biſhop of Banger, and had Judgement and a fieri fac. upon that to the Sheriff of Middleſex, who returns, That he was Clericus benefaciatus habens nullum Laicum feodum. And Hitcham Sergeant to the King, moved for direction of the Court, what Proceſs ought to iſſue, or may have a Writ to the Metropolitan, to make ſequeſtration; as it is 21 H. 6. 16, 17. 34 H. 6. 29. Richardſon ſaid, If you can ſatisfie us, That the Sequeſtration ought to be againſt the Biſhop, as againſt a Clerk; Then the Metropolitan ſhall do execution. Hutton ſaid, A Biſhop had Temporalties, and for that the Sheriff ought not to return nullum habet Laicum feodum. Richardſon demanded whether the Statute of Weſtm. the ſecond, which gives Elegit extends to the Temporalties of a Biſhop. Hutton not. Harvey and Crook ſaid, That he ought to have firſt a Teſtatum eſt, and then we may diſpute of that. But Hitcham doubted whether a Teſtatum eſt may iſſue to Wales. Richardſon, an Elegit may iſſue, and why not then a Teſtatum eſt. And they in the Kings Bench grant it without doubt.

2 Cr. 184. 2 Bull. 64. 166
1 Lev. 201
Raym 206

Stevens againſt the Biſhop of Lincoln, &c.

STevens and Croſſe were Plaintiffs againſt the Biſhop of Lincoln, Holms Incumbent, and Holiworth Defendents in a Quare impedit, And the iſſue was where the Prochein avoydance. It was given in evidence, that a Feme was ſeized for life of the Advowſon: And he in reverſion in Fee, being an Infant, grants the prochein avoydance. And after when he in the remainder came to full age: He reciting that grant, conceſſit & confirmavit prædictam advocationem habendam quando contigerit vacare. And afterwards the Wife dies, and the Church happens to be void. And it was ſaid by Davenport; That that is not a new Grant, but only a confirmation. Crook Coo. lib. 6. 14. Treports caſe; Tenent for life, and he in remainder makes a Leaſe; if the Tenant for life dye, the Declaration ſhould be that he in the remainder made the Leaſe. And ſo alſo by all the Juſtices, it ſhould be a confirmation, during the life of the Feme.

2 Ro. R. 109

If Judgement be given in an action at Common law; the Chancellor cannot alter or meddle with the Judgement given againſt him. But he may proceed againſt the Perſon for a corrupt conſcience; becauſe he took advantage of the Law againſt his conſcience, quod nota, &c.

William Watſons Caſe.

Lill. R. 37

AN action of Battery was brought againſt William Watſon for battery committed by him inſimul cum I. Watſon. And Judgment was given againſt him, and dammages and levyed and payed to the Plaintiff. And after in another Action which was brought againſt I. Watſon, and he alſo was found guilty. And Diggs moved in arreſt of Judgement, for that that he had recovered, and had execution againſt W. Watſon. But by the Court, Where ſeveral actions are brought againſt two for the ſame battery, and a recovery is had againſt the one, and an action is brought againſt the other, and that found alſo. The Court can never intend that to be the ſame Battery Becauſe he may commit 20 Batteries in one day. But if he may take any advantage of the firſt recovery it ought to be ſhewed in pleading. But if there be but one Original againſt both, and ſeveral Declarations produced, when he hath

1 Jo. 377
2 Cr. 74
Mo. 762
Y. 6. 67

it.

recovered, he hath dammages againſt the other: But if he recover againſt the other before he had execution againſt the firſt, Then he had his election to have whether dammages given againſt the firſt, or the dammages given againſt the other. And Coo. lib. 11. 56. Heydons Caſe, by Richardſon is to the ſame effect, *Trin. 2. Car. Com. Banc.*

Eve againſt Wright.

Cr. Ca. 75

Eve brought a Replevin againſt Wright who was known as Bayliff to the Lord Peters. For that the Lord Peters had a Court Leet within the Manor of Writtle. And that he diſtreined for an amerciament upon the Plaintiff at that Court Leet of the Lord, &c. And upon iſſue that he had not ſuch a Leet, The Jurors found that the Lord Peters at the time when, &c. had a Leet within the Manor, and that the Tenants ought to come to his Leet. But alſo they found that the Warden and Fellows of New College in Oxford had a Rectory alſo within the Manor of Writtle called the Roman fee: And that they time out of mind, &c. had a Leet within that Rectory, and that the Plaintiff is a Reſiant within the Roman fee: But whether upon the whole matter, the Lord Peters had a Leet upon all the Reſiants within the Manor of Writtle, they prayed the diſcretion of the Court in that. And it was ſaid by Richardſon, That the matter is found expreſly for the Lord Peters. And if the Court ſeemed to be agreed, then he aſſeſſed dammages, and that Verdict was clearly for the Defendant. And if the matter in Law might well come in queſtion, as the Jurors intend (ſcilicet) whether a Perſon will be compellable to two Leets, yet Judgement ſhall be given for the Lord Peters. For it might be a general Leet of the Hundred, or a ſpecial Leet within a Manor within the Hundred. As it is expreſly 21 E. 3. 34. And the Caſe of the Counteſs of Northumberland and Devonſhire, was in this Court before this time agreed, Crook Juſtice, 18 Iac. Banc. Reg. One Cooks and Sables Caſe, there was agreed to this purpoſe. Though a man is not compellable to be attendant to two Leets, although they be held at ſeveral dates; Yet by that Cuſtom they may be attendant. Like to Walgraves Caſe which was adjudged in this Court; That a Manor may be held by Copy of another. And that the Lord of a Copyhold-Manor may grant Copyhold. And this Judgement was affirmed good in the Kings Bench in a Writ of Error. For Cuſtome hath aboliſht that; And the opinion of the Court was, That he cannot be attendant on two Leets, if they be held at ſeveral dates. It was ſaid by Richardſon, That the Lord of the Roman fee, ſhall not be ſubject to the Leet of the Lord Peters. As appears by 21 E. 3. 33. And Crook ſaid, That that Book was good Law. For there when the party is amerced in the one Court, he cannot be puniſhed in the other Court for the ſame offence. And afterwards Richadſon and the whole Court ſaid, That he himſelf ſhall be ſubject to another Court, for his reſiance, or otherwiſe, he ſhould be exempt from every Leet. *2 Cr. 583* *2 Cr. 260*

Humbletons Caſe.

More of this you have before. Now they afterwards come, and the Caſe was recited in ſome thing different from the former (ſcilicet) That there being ſuch a Communication as afore, the conſideration was, That Palmer having now brought an Action againſt him, he ſhould defend the ſaid Sute in maintenance of their Tytle of Common, and that immediatly after Judgement given, he ſhould pay him half his coſts or 40 l. Upon which this Aſſumpſit is brought. And the Iſſue was, Whether

Trin. 3. Car. Com. Banc.

ther he defended the Sute in maintenance of their Title of Common, and it was found againſt the Defendant. And by the whole Court, the Plaintiff had well declared the conſideration. For the words are that he maintain the Title againſt Palmer; for the promiſe was after the action brought. And the Plaintiff is not to preſcribe what Plea he'll plead; but that he defend that Sute. And then when Palmer is not owner of the Soyle, as appears in the evidence in the Kings Bench. And ſo if a pretence to common fail, he ſhould be puniſht for a Treſpaſs where he ought not, Palmer being an Introder upon the King. And every Commoner may break the Common, if it be incloſed; Although he does not put cattel in immediately. But he may infriender by the other Commoners or his Tenents, and his Title of Common only excuſes him of the Treſpaſs. And alſo the Jury had found that it was in maintenance of the Title of Common expreſly. And ſo Judgement was entred for the Plaintiff, pleno conſenſu.

Dorothy Owen againſt Owen Price.

DOrothy Owen brought an action of the Caſe againſt Owen Price upon a trover of Converſion of one Load of Wheat, and one other of Barley, within the Rectory of Broody. And upon not guilty, the Jury found a ſpecial Verdict to this effect (viz.) Marmaduke Biſhop of St. Davies ſeiſed of the Rectory of Broody, and a Manor parcell of the Biſhoprick, 3 Auguſt. 27 El. makes a Leaſe of them being formerly demiſed to Anne Davyes, and the two Daughters P. and C. habendum a die datus for their lives ſucceſſively, viz. to A. and her Aſsigns, for her life, rendring the antient rent; and afterwards the firſt of September 27 El. makes a Letter of Attorny to I. S. to enter in the Rectory and Manor, and there to deliver ſeiſin ſecundam formam Cartæ, which he did accordingly. The Leaſe is confirmed, the Biſhop dies, and Wilburn his Succeſſor accepts the rent of A. and without any entry makes a ſecond Leaſe for two lives to the Defendant, and he is tranſlated. Laude the next Succeſſor before any acceptance makes another Leaſe for three lives, to the Plaintiff. And the Defendant took and converted the Grain, &c. Finch the Recorder for the Plaintiff, who endeavoured to deſtroy the two firſt Leaſes. And as to that, the firſt Leaſe is not warrantable by the Statute, 1 El. that depends upon conſideration of two things.

First, Whether the word Succeſsive ſo makes a Limitation of a Remainder, &c.

Secondly, Whether the Leaſe in Remainder be out of the Statute 1 El. alſo that I ought to maintain, That although the Leaſe is not warranted by the Statute, yet it is not void, but voidable by the Succeſſor, And that alſo contains two points.

2 Cr. 143

First, Whether it be void by the Common law (ſcil.) When a Leaſe is made to two habendum a die datus, and livery be 3 daies after by Attornsy be not good.

Secondly, Whether it be abſolutely void by the Statute. As to the firſt, a Leaſe ſucceſsively habendum (viz.) to A. and her Aſsigns for her life. That Habendum well ſettles the Eſtate by way of remainder, and it is not a Joynt-eſtate. 8 E. 3. There the doubt is firſt put, but the difference is, Where it is habendum ſucceſſive generally, then it is a Joynt-eſtate; But if it be with a reference and declaration, it is a good remainder. Br. 104. ſucceſſive generally does not make any remainder, unleſs in caſe of a copyhold ſibi & ſuis make an inheritance, 30 El. in Banc. Roy. 8 Rot. 856. The Lord Sturton makes a Leaſe to Thomas

mrs Hubbard, habendum to him and two others (ſcilicet) ſucceſſive for their lives, and to the longer liver of them. And it was adjudged, that none can take by that Deed, but Thomas Hubbard only; Who is only the party named, and that it is no remainder, for it is not made certain, who begins to take by the Remainder. Greenwood and Tilers Caſe in the Kings Bench. There ſuch a Leaſe is made, and the word Succeſſive comes after the limitation of the Eſtate. And the Judges gave the difference between this Caſe and Hilliards Caſe. But after in the Exchequer-Chamber, it was agreed to the contrary. So that Succeſſive put generally does nothing; But when it is ſhew'd who takes firſt, then it makes a Remainder. Dyer 361. habendum ſucceſſive, prout nominatur in Indentura. It was ruled that that was a Remainder. And this Caſe is more ſtrong, for every one is named in his order. And then if it be not a Joint-eſtate, but in remainder, it is not warrantable by the Statute of 1 El. 6. Rep. Dean and Chapters Caſe of Worceſter. And that Statute had relation to the Statute of 32 H. 8. of making of Leaſes; For th: Statute of 1 El. ought in reaſon and equity to have the ſame conſtructions, as the Statutes aforeſaid; and ſo it had been adjudged in one Wheeler and Danbyes Caſe. Then that Leaſe although it be void, yet is not abſolutely void, but voidable, &c. And as to the point in Law, the Livery is good as it ſeemed. But now if there was a Leaſe for life, or a Feoffment de die datus, and Livery made the ſame day, by the Feoffor himſelf or his Attorney, that it ſhould be void. For the day of the date ſhould be excluded, and the Livery cannot operate in futuro; For it is res ponderoſa, and it can never expect and be in ſuſpence. 2 Rep. 55. Bucklers Caſe. But I confeſs in this laſt Caſe, a favourable conſtruction ought to be made, where the Poſſeſſion had long continued according to the letters Patents; Which ſhould intend that the Livery was in the ſame inſtant; And in a thing that lies in Grant, the ſame conſtruction is made; as if Rent in Common in eſſe ſhould be granted, de die to come, the Grant is void, Bucklers Caſe before. H. 8 H. 7. 33. 8 H. 6. 35 coment. 145. Throgmorton and Traceys Caſe, agrees the difference of a Rent granted de novo, and a Rent in eſſe. 9 E. 2. tit. Dower. So that a thing granted cannot be, to begin at a day to come; But not by the reaſon only given, that he cannot reſerve a particular Eſtate to himſelf; But becauſe it is a Frank-tenement which ought to paſs preſently, Paſc. 51 Iac. Kings Bench, Sir Robert Iames Caſe. In a Replevin againſt him and Adams it was agreed; That if a Reverſion be bargained and ſold at a day to come for years, it is good. And ſo alſo is Sir Rowland Haywards Caſe. 2 Rep. 35. If a Feoffment or a Leaſe for life was a die datus. If the Leſſor or a Perſon the next day make Livery it is good without queſtion. For the abſurdity that a Frank-tenement ſhould be in ſuſpence is not ſo: for the life is given by the Livery after the date. And there is a great difference between things that lye in Grant, and a Feoffment. For in Caſe of a Grant, that is a die datus, it cannot be made good. In Caſe where a Feoffment is made, the Deed is the evidence, and all is not done before the Livery. But in the other Caſe after the Livery, nothing is to be done by the other. And that is the reaſon of Buckleys Caſe, That an attournment cannot make the Grant good, or the form of a Deed. But where Livery is, it paſſes by Livery only, where no Eſtate is mentioned. Alſo one Bowles and Smyths Caſe. The Prebend of Bowe makes a Leaſe for 3 lives, a die datus, and makes Livery after the day; Adjudged that the Leaſe and Livery were good; as it is in Greenwood and Tilers Caſe in the Kings Bench, Trin. 10 Iac. rot. 1039. & 18 Iac. Argued at Serjeants Inne. One Will. Long and Alice his wife, by Deeds makes a Leaſe to Fiſher and Anne his Wife, and

Trin. 3. Car. com. Banc. Godb. 51 Hutt. 87. Cro. 78 190. 310. 4 Leo. 246. 2 Cr. 563 Palm. 29. 2 Ro. R. 366. Hob. 314. 1 Cr. 143 1 Ro. R. 229 Hob. 314 2 Ro. R. 766

Trin. 3 Car. com. banc.

Ioan his Daughter, habendum at Michaelmas next after the date of the Indenture, for lives ſucceſsively. The Leſſor and his wife after the day paſt makes livery in perſon, ſecundum formam chartæ. Longe dies, and Alice receives the rent of Fiſher. Fiſher and his wife die. Alice makes a Feoffment to I. S. Greenwood the Leſſee of Ioan, brought an Eject. firm. againſt Tyler the leſſee of I. S. And theſe points were reſolved, That the livery after the day, made the leaſe good, which is the point now ſingle in queſtion.

2. Alice and Ioan cannot take jointly.

3. That Ioan cannot take a greater Eſtate than for her own life, and not pur auter vie. For it was not the meaning of the Deed. But there they held, that the Succeſſor after the lives, was the Remainder. But afterwards in a Writ of Errror it was denied.

4. That that acceptance of the rent tyes the Wife; Which could not be unleſſe the rent remain good. For the aſſent ought to be manifeſt by Deed. So that the Deed is good to direct the eſtate, and prove the Aſſent. For otherwiſe the Feoffment ſo had avoided the leaſe. But where the Perſon is diſabled it is otherwiſe. As if a Feoffment be made by a Feme Covert, and livery made by Attorny, the Deed is void.

But now the grand doubt is, whether the livery after the day by Attorny be good. I will agree that if the letter of Attorny was made the ſame day, that the deed bore date, the livery is void. For it ſhal not be in the power of an Attorny to invalidate or validate the leaſe made by an other. So if a letter of Attorny be contained in a Charter of feoffment, or be in another Deed, delivered at the ſame day; The delivery upon that Deed ſhall be nought. And the Attorney by his livery cannot make the leaſe or feoffment good, no more than (in Bucklers Caſe) an attornment can make a Grant good. 9 Iac. com. banc. rot. 1414. Walter, and Dean and Chapters Caſe of Worceſter cited before. In a Writ of covenant. There a leaſe was made by C. for three lives bearing date the 10 of Novemb. 42 E. and a letter of Attorney to deliver ſeiſin. The Attorney delivered ſeiſin a year after, when two rent daies were incurred. And it was doubted whether that livery was good: becauſe that two rent daies were paſſed, before he had executed his Authority. And it was adjudged good. And it was not like the Lord Cromwells Caſe, 2 Rep. Where a performance of a Condition for the avoidance of an advowſon was void, no time being limitted. For in Caſe of authority, it may be executed 10 years after. So that what the Feoffor himſelf may do, he may give authority to another to do that. For if he be bed-rid, or other infirmity, ſhall the law ſo ſetter him, that what he can do himſelf, he cannot in the ſame Caſe do by any other? For although you may ſay, that he may make a new leaſe: yet perhaps he is tyed by Covenants or Obligations ſo, by which he ſhall be worſe intangled. And the reaſon of the expectancy of the Frank-tenement alſo, which an Attorney may make good or bad; a leaſe of another is included. Becauſe where it is miſchievous to none, the law does not envy the Caſe of the party, as Combes Caſe is. A Surrender, by an Attorney of a Copihold is good: and we can (you know) appear by Attorney in actions, and acknowledge Judgements. But it will be objected, that livery by Attorney is not good without a Charter of Feoffment, as Kirkby ſaid. 16 H. 7. fol. 51. Plo. 6. And if thoſe Books are not law. Yet Greenwood and Tilers Caſe, before recited, will reſolve that doubt; That the Deed is not void if the livery be after; and if the Entry be preſently, he is a Tenent at will, or a Diſſeiſor, as it is in Buckler's Caſe. For it cannot be made good by any thing after. Yet the Deeds remain, or otherwiſe his acceptance did not bar him. I confeſs that an Authority to make livery cannot be made by Paroll, as

Co. 2 R. 55 / Ro R. 229
2 And. 29
Mo. 423
Cr. el. 450 585
Ow. 136
Hob. 314
2 Cr. 463

10 H. 8. 11 H. 4. for it may be revoked by Parol. As a Will, which cannot be made but by writing, yet it may be revoked by Parol. 26 Aſſ. But an authority to make a Leaſe is made by Parol, 30 E. 3. 31, 32. If a Deed purporting an Eſtate in Fee ſimple be read to the Feoffor, who is an illiterate man, to paſs only an Eſtate tail; And a Letter of Attorney was to deliver ſeiſin ſecundum formam Chartæ, which is well read to him; Yet it was reſolved that all is void. And that he may plead it was not his deed, to the letter of Attorny. For if the Deed be void, the Letter of Attorney which releaſes to it is void alſo. But I conceive, if it be put in a Deed that gives Land a declaration, and the Attorney authoriſed by expreſs words, delivers ſeiſin three dayes before; that livery may be good. And then it is more ſtrong when he appoints his Attorney after the day; as it is in this Caſe. A Feoffment made from a day paſt is good, and the time before the livery is idle. And for another reaſon in Caſe of Aſſurances, ſuch nice conſtructions ought not to be made. And becauſe there is no difference whether livery be made in Perſon or by Attorney. Now there is a difference between an Authority and Covenance, H. 20. & 40 Eliz. in an Action in. in this Court, Marriots Caſe. A Charter of Feoffment was made to the Leſſor of the Plaintiffs, 10 Septemb. And the Feoffee reciting that that Charter was made the 11 of September, authoriſed him to take livery ſecundum formam Chartæ. And it was reſolved, becauſe the date was miſtaken, although all other circumſtances agreed; Becauſe that the authority ought to be taken ſtrictly, that that is a void livery. But in Dyer 116. A Leaſe is made the 30 day of Auguſt for 21 years, and afterwards the Leſſor reciting that the Leaſe was made the 9th of Auguſt, demiſes the Land habendum after the firſt Leaſe determined. And it was reſolved to be a good Leaſe: becauſe that the beginning and ending of the Leaſe agreed; And in the Caſe of Marrior, it was reſolved.

Lib. 3. Coll. Com. Banc.

Secondly, That an Attorny cannot be without Deed.

Thirdly, Although that the Feoffor in perſon makes livery, yet it is void; Becauſe that the Attorney cannot take the livery upon that Deed without that authority. But where that one may do that thing himſelf, and he gives the Attorney the ſame authority: It is all one if Feoffment be made to I. S. and I. S. makes an Attorney to take livery, whereof livery is made, yet is good; And it is all one, as if livery had been made to I. S. himſelf. 19 H. 6. A Feoffment upon Condition that he enfeoff I. S. void by the Statute of 1 Eliz. or voidable: and it ſeemed it was but voidable by the Succeſſor, by entry or by action. You may ſee that the words are as plain as may be. They ſhall be utterly void to all intents and purpoſes. But quid hæret in litera. For her meaning was, That it ſhall be void by the Succeſſor, and that conſtruction had alwaies been made 3 Rep. 19. 11 Rep. 73. So the Statute 23 H. 6. of Sheriffs had been expounded. 7 E. 4. 4. There cannot be non eſt factum pleaded. And upon the Statute of Uſury; That an uſurious contract ſhall be void; Yet the Statute ought to be pleaded. Acts of Parliament where there are many doubts, ſhall be expounded by the Common law; For that, that at the Common law a Free-hold cannot be helped but by Entry. 11 H. 7. There is a diverſity between a Leaſe for years, and a Leaſe for life. Dyer 222. And it is the dignity of a free-hold to reduce it by free-hold. Then if it ſtood with the Common law; It is not to be void without Entry. For as a ſolemn Ceremony created, the ſame muſt defeat it. The Statute ſhall be ſo expounded. And if it was in Caſe of a leaſe years of a Biſhop, it ſhall not be void without Entry. 3 Rep. Pennants Caſe, Dyer 229. 8 H. 5. 11 E. 3. Commen. 139. It was never the meaning of the Act to make

2 Ro. K. 109

it

Vin. 3. Car. Com. Banc.

it actually void. For if the words are purſued ſtrictly, then it ſhall be void immediately againſt the Biſhop himſelf. Then the Succeſſor in lieu of a benefit, ſhall take an advantage of the Statute; For he cannot make Leaſes but of things uſually demiſed, 32 Eliz. Sale and Sale againſt the Biſhop of Coventry in a Quare impedit. It was adjudged, That a Quare impedit well lies by an Executor for diſturbance made to the Teſtator. And alſo that a Leaſe for years is good, notwithſtanding the Statute. The Statute does not intend the benefit of the Leſſee, but of the Succeſſor himſelf: And the Succeſſor had his Election to accept the Rent or the Land: And if it ſhould be void, his Election is gone. Tallengers and Dentons Caſe 4. Jac. A Leaſe is made by the Biſhop of Carliſle, of the Tithes which is out of the Statute: And there it is void againſt the Succeſſor. For that, that he hath no remedy, for the Rent reſerved upon it. And that point is ſo adjudged upon the Statute of the 13 Eliz. Walters Caſe before reſolved, that a Leaſe made by Dean and Chapter, not warranted by the Statute, is but voydable againſt the Succeſſor, Paſ. 6 Iac. rot. 1041. Wheeler and Danbies Caſe: Robert Biſhop of Gloceſter, 30 Eliz. makes a Leaſe to Iaſper, habendum a die datus, to him for life, the remainder to William, rendring the ancient Rent. The firſt Leſſee dies, the Succeſſor having notice of it, and that divers Rents were behinde, commanded his Bayliff, that he ſhould receive the Rents. The Bayliff enters them, and receives Rent of that Leſſee, the Biſhop having notice of it. And theſe points were reſolved.

2 Cr. 173
2 Ro. R. 161
1 Go. 406

Firſt, the Jury finding a Leaſe, a die datus, might be intended good, for that the Entry was made after the day: yet the Jury finding a thing impoſsible, does not conclude the Judges.

Secondly that a Leaſe in remainder is not warranted by the Statute, 1 Eliz.

Thirdly, that the Leaſe was but voydable by the Succeſſor: for the Statute was made for the benefit of the Succeſſor, but the grand Queſtion was, of the manner of acceptance, and reſolved.

Fourthly, that the acceptance binds the Biſhop, and the Authority given to the Bayliff, and alſo his receipt. For it differs where the Bayliff of his own accord receives Rent. Dyer. And they alſo ſay, that that was to perfect an eſtate ſetled. And it differs from an Attournment, which is to perfect an eſtate ſetled: For there notice is requiſite, &c.

Gammons Caſe again.

HEndon ſaid, that a Scire facias does not lie upon that record: becauſe an action of debt well lies: For no preſident can be ſhewn, that a Judgement given in an inferiour Court may be executed ſo. For firſt, that Court ſhall not make an Inſtrument to execute Judgement given in another Court. It is ſeen that an Attaint lies of falſe Judgement given in an inferiour Court. Take the Caſe in 14 H. 4. 4. And ſo if iſſue be joyned in an inferiour Court without cuſtom: It ſhall not be removed to be tryed ſo, And ſo it is our Caſe, &c. Secondly, the Statutes do not give them power (viz.) 26 H. 8. & 34 H 8. makes the matter clear that it cannot be. Error in an Aſsize before the Juſtices of Aſsize, will not lye in this Court. For Judges Itinerant are ſuperior. And thoſe Judges are appointed by Act of Parliament; and ſo the Judges alſo in Wales are by Act of Parliament: And having power a Oyer et terminer. It is not found that after Judgement a Certiorari had been received to remove the Record out of an Inferiour Court: And the miſchief would be, if Judgement ſhould be given for 20 l. it ſhould be executory through all the Realm, where they have but a ſpecial Juriſdiction. And alſo the tenor of the Record is only removed, and execution cannot be out of the tenor of the Record. Dyer 369. Plow. 52. Richardſon. The queſtion is, whether

ther when the Record is ſo removed, whether it ſhall be idle: If Judgement be given in an Inferiour Court, which holds Plea by preſcription, or by grant, and removed by Writ of Error, if the Judgement be affirmed we may award Execution. 16 Jac. There is an expreſs preſident of a Judgement in an Inferiour Court and a Scire facias is granted ſo. And alſo a Scire facias is granted in lieu of an action of debt. For by the Common Law he might not have a Scire facias after the year; but an action of debt. And by the Common Law debt lies in that Caſe, Harvey and Crook Juſtices, ſaid, that Court ſhall not be an Inſtrument to execute Judgement in an inferiour Court, which they cannot. And alſo the Land of the Defendant ſhall be lyable to an execution in any place in England: where before only the Land within the place was lyable. And alſo the purchaſer could never finde out what executions might be upon the Land. Richardſon ſaid, that the miſchief would be great on both ſides. For otherwiſe what Judgement was given: The Defendant would remove his goods out of the Juriſdiction of the Court, and then the Plaintiff had no remedy but by new original. And Crook Juſtice. If a man brings an action in a Court, he ought to examine what the end of that will be. For it is a preſident, a man ought to reſpect things in their end. For it is his own folly to commence an action, where he cannot have execution. For that, he may commence his action, and have execution in any place in England. And although that a forrain Plea in an Inferiour Court may be tryed ſo, yet it is by Act of Parliament (viz.) 6 E. 1. 12. which proves by the Common Law there was no remedy. *Vin. 3 Car. Com. Banc.*

Tithes of Pidgeons and Acorns.

A Parſon Libels in the Spiritual Court for Tithes of Pidgeons and Acorns: And the Defendant prayed a prohibition: Becauſe the Pidgeons were ſpent in his own houſe: and the Acorns dropt from the Tree and his Hogs eat them. And it was ſaid by the Court, Acorns are Tithable, 11 Rep. 49. But then they ought to be gathered, and alſo ſold. And a prohibition was clearly granted.

Thomas Wilcocks Caſe.

MOre of the Caſe of the Univerſity of Oxford.
Thomas Wilcocks, Mr. of Arts in St. Mary Hall in Oxford, was ſued in the Chancellors Court there, by Anne wife of Ralph Bradwell and Chriſtian her daughter; For calling the wife Bawd, and old Bawd; and the daughter, Whore, and ſcurvey pockey-faced whore. And they procured two Sentences againſt Wilcocks, and upon them he had two prohibitions: And Davenport moved for a Procedendo: for that, that by their Charter which was confirmed by Parliament, The Chancellor or his Deputy ſhall have Conuſans of all cauſes perſonal, where one of the parties is a Scholar, And the Charter was ſhewed in Court, which was to this purpoſe, That they ſhall hold Pleas, &c. or Secundum morem Univerſitatis, or Secundum legem terre. And the cuſtom was to proceed according to the Civil Law. And it was reſolved:

First, that the King by his Charter deprives the ſubject of his Liberty and Privilege of Tryal: As he cannot by his Letters Patents alter the nature of Gavelkinde Land; but by preſcription he may alter it in particular places: As 9 H. 6. 44. In corpus cum cauſa to the Chancellor of Oxford, was certified that the priſoner, Pro extenſione detentus fuit & convictus. And an exception was taken for that, that he ſhould have been indicted and convicted: and it was anſwered that it was Mos Univerſitatis,

And

Trin. 3 Car. Com. Banc.

And by Hutton Juſtice. That cuſtom was to be intended to be by preſcription. But ſo the Charter is confirmed by Act of Parliament, it is as good.

Secondly, that there is a good cauſe of action in the Chancellors Court. For Wilcocks who is one of the parties is a Scholar, and the Charter was only made for the eaſe of Scholars, that their Studies might not be interrupted, by Suites in other Courts: But then he ought to be a Scholar reſident in the Univerſity at the time of the Sute commenced there. And he ought to be only one of the parties. And for that, if another be joyned with him, he ſhall not have the privledge or benefit of the Charter: as it is 14 H.4.21. and by Richardſon chief Juſtice, that is not a privledge which may be waved: for every perſon may Recuſare jura introducta pro ſe: But that it was an exempt Juriſdiction, and differs where the privledge goes to the perſon. As if a Clerk, in his Court will ſue in another Court, or ſuffer himſelf to be ſued, that is a Waver of the Privledge.

Thirdly, that a Proceedendo ſhall not be granted, for that, the Charter is not pleaded; for the Judges give Judgement of the Record, and the cauſe of their Judgement ought to appear by pleading of the Record. And alſo a prohibition is granted where by Demurrer, or by Pleading, and not by verbal ſurmiſe there ought to be a diſcharge. And in the caſe of a prohibition, It is not like the Caſe of 35 H.6.24. Where Conuſans is one time allowed by Charter ſhewn, and another Record there ſhould be allowed without demand, without other ſhewing: But Yelverton Juſtice, to the contrary, That it might be remanded upon pleading of the Charter. And he ſaid, that there was a difference, where the ſuggeſtion was upon matter of Fact, as preſcription, &c. Where an iſſue may be taken, there it ought to be pleaded in writing, which appears fully by the mean of the Court, and not by ſuggeſtion.

Fourthly, it was reſolved that a prohibition may be granted, in caſe where the Court cannot give other remedy, for the eaſe of the Subiect, who is the party; as it was adjudged in the Court of Requeſts: Upon the cuſtom of London, concerning Orphans, a prohibition was granted; and yet no remedy at Common Law was afterwards to be expected. Trin 5. Car.

Fawkner againſt Bellingham. p. 36

1 Cr. 80. 214
1 Go 233

FAwkner againſt Bellingham in a Replevin. The Avowry was, for that, that the Defendant was Lord of a Manor, and of Lands which were Chauntry Lands; and held of him by Rent and other Services: And after coming to the Crown by the Statute of 10 E.6. cap. 14. Who granted it then over by Letters Patents, &c. And now the Lord diſtreins for Rent, and avows that he had not ſeiſin within fourty years: And whether ſeiſin was requiſite for him who made the Conuſans, was the ſole queſtion in the Argument.

Firſt, for that, that it is a new Rent created by the Statute of 1 E.6. For when that Land is granted to the King by Parliament, yet the King hath operation upon it, and may diſpoſe of it.

Secondly, that the Land paſſed from the Priеſt and others, by their aſſent confirming it. And it is a Grant of the Seigniory by the Lord himſelf unleſs the ſaving hinder it. But ſo by the Grant the Rent is extinguiſhed: And the ſaving is ſo a creation of a new Rent, 1. rep. 47. Altomeoods Caſe. And there is diverſity between a Rent-ſervice, viz. where the Tenant grants Land to the King, and he grants that over: He cannot diſtrein upon the Patentee: for it is diſtinct from a Rent charge. Stamford prerogar. 75. Mich. 20. E. 3. 17. And ſo it is ordered by the

the Statute de Religione, when he enters by Mortmain, that he ought to revive the Services. Stam. 27. If the King enters upon my Tenant, there a Petition of Right lies, Dyer 313. 10 rep. 47. By the ſaving in the Statute of Wills, 16. A primer Seiſin is given to the King de novo, where he ought to have it before: And then being a new Rent no Seiſin is requiſite. Secondly, the ſecond reaſon is, for that there is a new remedy: and then no matter whether it be old Rent or new Rent, Finchden. 1 Rent granted out of White-acre, and a diſtreſs out of Black-acre, the Rent yet remains, and there is one thing part of the Rent, another of the remedy: Becauſe the Rent is only altered in quality, Dyer 31. There our Caſe directly. Now the Statute of Limitations is a Statute for the good of the Commonwealth, to ſettle inheritances and poſſeſſions. And it ſhould be expounded liberally: Then if a ſcruple be of the Act, it ought to be expounded benignly. And ſo it is of all other Statutes which ſettle poſſeſſions: Always ſhall be expounded favourably for the eaſe and benefit of the Tenant and Lord. And for that adjudged, That a Copyhold and Leaſes for years are within that Statute. And the Statute of 32 H. 8. 11. rep. 71. binds both King and Realm, becauſe it is for the publick good.

Trin. 3 Car. com. Banc.

Owen againſt Price before.

BRamſton argued for the Defendant. I agree that Leaſe to be a Leaſe in remainder; and I admit alſo that, that Leaſe is warranted by the Statute, 10 Eliz. For that, that he is not puniſhable of waſte: And the caſe admits two queſtions: whether it be a void Leaſe at Common Law.

And Firſt, In reſpect of the limitation.

Secondly, there is not any Livery in the Caſe.

Wherefore firſt of all, it had been ſaid a Frank Tenement cannot paſs from a day to come, in caſe of a Grant. 38 H. 6. 34. 8 H 7. Claytons Caſe 5. rep. It had been agreed that a Livery made the firſt day by himſelf or by his Attorney ſhould not be good. And moreover if by his Attourney after the day, if his Grant may be granted, the ſame day it is not good. And then I hold that the date of the Grant of Attourney is not material, Trin. 43 Eliz. rot. 403. Conibar. It was reſolved in ſuch a Caſe as that is: That the Livery is not good. And the reaſon was, that the Livery had not relation to the Deed, which was void in Law. Bucklers and Binſtons Caſe. The releaſe was made 1 May, as this, and executed by Attourney, and by Attourney authoriſed the ſame day, the ſecond of May. And it was adjudged to be void by the ſame reaſon. Greenwood and Tilers Caſe. He had much inſiſted upon that: yet in the enlargement of the Caſe, this point was reſolved. That if the Livery was by Attourney, it ſhould be void, and the reaſon there was, That although that the deed was void, yet the Livery made in perſon ought to be good. But the Deed can never by Livery be made good, which was void to that purpoſe. And it had been ſaid and objected, that it might be done in perſon, and therefore by Attourney. I agree that by that Livery an Eſtate paſſes, but not by the Deed. But the Livery makes it paſs out of the Intereſt that the Leſſor had. But by that reaſon that ſuch a Leaſe ſhall be good. where Livery is by the Leſſor himſelf, will not ſtand with our Caſe. And divers Caſes declare this difference. 23 E. 3. 31, 32. A Deed of Feoffment is made by Mawbry, where he had nothing in the Land, and after purchaſes and makes Livery, Secundum formam Chart. That eſtate paſſes but not by the Deed. But if Livery had been there made by Attourney it had not been good. If a Feme Covert, or a Monk makes ſuch a Charter of Feoffment, and after Coverture or deraign-

Trin. 3 Car. Com. Banc.

ment, makes livery then by Attorny: ſuch livery then cannot be good; For he cannot exceed his authority, which was to make good his firſt Deed. 22 H. 6 32. A feoffment of a Manor by Deed of two acres, all paſs, not by deed but by livery; but if by Attorny otherwiſe it is; Livery according to deed, (where there is not any) by Attorny is void. Kelway 64. A leaſe made by Baron and Feme may be pleaded without Deed. Coparceners agregate cannot make a Leaſe without Deed; But a Biſhop or a ſingle Corporation may: and it ſhall be good againſt him, but not againſt his Succeſſor; Dyer 19. 17 E. 4. 17. Littleton ſaid, Where an Eſtate paſſes by Deed, then the Livery is but a Ceremony. And in the Chapter of Conditions. he in the remainder ſhall be bound by Condition in the Deed. Becauſe that he took by that. So that by your reaſons you would make that acknowledgement and inrollment by the Grantor himſelf, to be a Ceremony; and yet nothing paſs. And the rule in Magdalen College Caſes. If you will have a thing by Deed, to be nought, no ſubſequent Act can make it good. And then the leaſe is made to three, and the Grant of Attorny to deliver ſeiſin, to 3. and he delivers ſeiſin but to one; although that the others take in remainder. Yet he ought not to take upon him the cogniſance of law, but purſue his authority. A leaſe is made for years the remainder in fee, and a Warrant of Attorney to deliver ſeiſin to him in the remainder. And the Attorny delivers ſeiſin to the Tenent for years, It is not good. And yet in Law it ought to be made to him. 11 H. 7. 13. A feoffment and a letter of Attorny to deliver ſeiſin to two, and he does it but to one, That is a diſſeiſin, and abſolutely void by the Statute, Dyer 177. Hill. 39. Eliz com. banc. rot. 941.

Iohnſon againſt Morris and Edmunds

IOhnſon brought a Treſpaſs againſt Morris and Edmunds, quare clauſum fregit et herbam ſuis depaſtus eſt, &c. The Defendant ſaid that all the time of the Treſpaſs, he was ſeiſed of the Manor of Amner; And that they, and all their Predeceſſors, had a Sheep-walk in the place aſſigned, &c. and for all the year, but when it was ſowed for all the ſheep levant and couchant upon the Manor, &c. The Plaintiff replies that the Defendant ſuch a day put 200 ſheep within that Land, and that thoſe ſheep were levant and couchant upon the Chauntry fold: Whereupon the Defendant demurred. Crowley Juſtice. The Declarations are general of ſheep, without expreſsing the number; and for that the Juſtification is good in the generalty; and now when the replication is of 200 ſheep, and does not ſay alias, it is naught. Hutton, It is not directly put, that the Chauntry land is parcel of the Manor, and then we cannot ſo intend it, and yet by the Demurrer it is confeſſed. Richarſon, It is not ſufficient to ſay, that they were levant and couchant upon the Chauntry fold; without ſaying abſque hoc, that they were parcel of the Manor. And it is incertain whether there were other ſheep: and we by Imagination cannot intend it, &c. Harvey and Hutton, The Replication is good; For that, that in the Replication he now declares of what ſheep he complain'd before; And he does not agree the ſheep which the Defendant hath juſtified; but he miſtakes his Juſtification. For he brings his action for another thing; As the Treſpaſs is made, quare clauſum fregit; The Defendant juſtifies for a way, and the Plaintiff ſays that he went out of the way; It is a good replication. And a new Aſſignment of the Sheep is contained in the Replication, the Declaration being general. And although that he did not ſay directly, that the ſheep are other. Yet put all the parts of the Replication together, and it will appear that they are other. But Richardſon and Crook on the contrary. The Re-

Replication is not a confeſsion and avoidance, nor traverſe of the bar, if it had been ſaid, Ducent. alias oves. But then the Declaration had been avoided, and the Defendant might plead not guilty to them. And although it was ſaid, levant and couchant upon the Chauntry fold, yet it is but an argument: and eppreſs allegation in bar cannot be anſwered by arguments. For a preſcription is for Ewes, and the Treſpaſs quare oves &c. generally. The Defendant alleges his preſcription, and avows that they were oves matrices. And the Plaintiff replies that they were oves verveces. That is not good without a traverſe abſque hoc, that they were oves matrices. And the Caſe put before of Juſtification by way was agreed; For there it was confeſſed and avoided by Replication. And alſo that Caſe alleged by Hutton to be adjudged. A Battery is alleged to be done the firſt of May. The Defendant juſtifies deſon aſſault dem. the ſame day. The Plaintiff replies that that Battery was four hours after the other Battery. And it was traverſed, and well, which was ordered by the Court that an alias ſhould be added in the Replication, &c. *Trin. 3 Car. Com. Banc.*

Fawnes Caſe.

FAwne an Attorney in this Court, had arreſted divers perſons, by Proceſs without original in Actions of debt. And where the King ought to have for every hundred pounds in the Obligation 10 s. for a Fine, if the ſum exceeded 50 l. And when the original is ſued, the ſaid Fawne took the mony to himſelf of the Clyents. And the Curſiter complains to the Chancellor, and he informs the Court. And it was ſaid by Richardſon, becauſe he had taken his oath which every Attorny ought to take, That he ſhall do no falſity; And alſo we by our Oath bound to puniſh ſuch offences: Thereſore his ſentence was: That his Name ſhould be put out of the Roll, and thruſt over the Bar, and committed to the Fleet; Which was executed accordingly. 20 H. 6. 37. & 41. E. 3. 1. Which Caſes prove the ſame.

James and Thoroughgood againſt Collins.

JAmes and Thoroughgood brought Treſpaſs againſt Collins. And the Caſe was this, A man makes his Teſtament and gives to 5 men their heirs and aſsigns, certain Houſes in Fleet-ſtreet, &c. All of them to have part and part alike, and the one to have as much as the other. And whether the Defendants were Jointtenants or tenants in Common was the Queſtion; and it was adjudged and reſolved that they were Tenants in Common. And the ſame Caſe in 2, 3 Phil. & Mary in Bendlows Reports is adjudged ſo. And alſo in Lucan and Locks Caſe in the Kings Bench It was afterwards remembred and agreed to be good Law, Ratcliffs Caſe. Adviſe to two and his Heirs, is Joynt-tenency by the whole Court, againſt the opinion of Audley. *Fly. 434. 2 And. 17. 3 Lev. 373. Salk. 226.*

It was ſaid by the Court, that an Officer of the Court ought to be anſwered in any action de die in diem. Quod nota, &c.

Beguall againſt Owen.

BEguall brought a Writ of Partition againſt Owen before the Juſtices of Aſsiſe, at the grand Seſsions in Angleſey. And the Defendant pleaded the general iſſue. The Plaintiff prefers a Bill in Engliſh, and ſays that Owen is Tenant in Common with him, and that divers of his

Vin. 3 Car. Com. Bank.

ment, Makes livery then by Attorny: ſuch livery then cannot be good; For he cannot exceed his authority, which was to make good his firſt Deed. 22 H. 6 32. A feoffment of a Mannor by Deed of two acres, all paſs, not by deed but by livery; but if by Attornyotherwiſe it is; Livery according to deed, (where there is not any) by Attorny is void. Kelway 64. A leaſe made by Baron and Feme may be pleaded without Deed. Coparceners agregate cannot make a Leaſe without Deed; But a Biſhop or a ſingle Corporation may: and it ſhall be good againſt him, but not againſt his Succeſſor; Dyer 19. 17 E. 4. 17. Littleton ſaid, Where an Eſtate paſſes by Deed, then the Livery is but a Ceremony. And in the Chapter of Conditions, he in the remainder ſhall be bound by Condition in the Deed. Becauſe that he took by that. So that by your reaſons you would make that acknowledgement and inrollment by the Grantor himſelf, to be a Ceremony; and yet nothing paſs. And the rule in Magdalen College Caſes. If you will have a thing by Deed, to be nought, no ſubſequent Act can make it good. And then the leaſe is made to three, and the Grant of Attorny to deliver ſeiſin, to 3. and he delivers ſeiſin but to one; although that the others take in remainder. Yet he ought not to take upon him the cogniſance of law, but purſue his authority. A leaſe is made for years the remainder in fee, and a Warrant of Attorney to deliver ſeiſin to him in the remainder. And the Attorny delivers ſeiſin to the Tenent for years, It is not good. And yet in Law it ought to be made to him. 11 H. 7. 13. A feoffment and a letter of Attorny to deliver ſeiſin to two, and he does it but to one, That is a diſſeiſin, and abſolutely void by the Statute, Dyer 177. Hill. 39. Eliz com. banc. rot. 941.

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FAwne an Attorney in this Court, had arreſted divers perſons, by Proceſs without original in Actions of debt. And where the King ought to have for every hundred pounds in the Obligation 10 s. for a Fine, if the ſum exceeded 50 l. And when the original is ſued, the ſaid Fawne took the mony to himſelf of the Clyents. And the Curſiter complains to the Chancellor, and he informs the Court. And it was ſaid by Richardſon, becauſe he had taken his oath which every Attorny ought to take, That he ſhall do no falſity; And alſo we by our Oath bound to puniſh ſuch offences: Therefore his ſentence was: That his Name ſhould be put out of the Roll, and thruſt over the Bar, and committed to the Fleet; Which was executed accordingly. 20 H. 6. 37. & 41. E. 3. 1. Which Caſes prove the ſame.

James and Thoroughgood againſt Collins.

JAmes and Thoroughgood brought Treſpaſs againſt Collins. And the Caſe was this, A man makes his Teſtament and gives to 5 men their heirs and aſsigns, certain Houſes in Fleet-ſtreet, &c. All of them to have part and part alike, and the one to have as much as the other. And whether the Defendants were Join††enants or tenants in Common was the Queſtion; and it was adjudged and reſolved that they were Tenants in Common. And the ſame Caſe in 2, 3 Phil. & Mary in Bendlows Reports is adjudged ſo. And alſo in Lucan and Locks Caſe in the Kings Bench It was afterwards remembred and agreed to be good Law, Ratcliffs Caſe. Adviſe to two and his heirs, is Joynt-tenency by the whole Court, againſt the opinion of Audley. Fitz. 434 2 Andr. 17 3 Lev. 373 Salk. 226

It was ſaid by the Court, that an Officer of the Court ought to be anſwered in any action de die in diem. Quod nota, &c.

Beguall againſt Owen.

BEguall brought a Writ of Partition againſt Owen before the Juſtices of Aſsiſe, at the grand Seſsions in Angleſey. And the Defendant pleaded the general iſſue. The Plaintiff prefers a Bill in Engliſh, and ſays that Owen is Tenant in Common with him, and that divers of his

Trin. 3 Car. Com. Banc.

Witneſſes which can prove his Title are ſo aged, that they cannot come to the Seſſions, and deſires a Commiſſion to examine the Witneſſes concerning the Title in perpetuam rei memoriam. And Henden moved for a Prohibition; For that, that Cauſe would be dangerous for the Subject, that ſuch Teſtimonies taken in his abſence ſhould be for tryal of his Title.

Secondly, That that examination before the Tryal is againſt the Statute of 26 H. 8. And although they have it in Chancery, yet it is not ſo here. But it was denied by the Court: For there was never ſeen ſuch a Preſident, Of a Prohibition to a grand Seſſions. And by Yelverton. They have it in Chancery; and if it be not preſcribed in what manner they ſhall have it, it ſhould be as in the Chancery. Hutton, That Commiſſion is not prejudicial to the Subject, although a Prohibition be grantable. For ſuch Teſtimonies are not uſed but after the Witneſſes are dead; And a man cannot preſerve them alive, and perchance his Title reſts upon their Teſtimonies.

Iane Heeles Caſe.

IAne Heele Adminiſtratrix of her Husband, brought an action of Debt upon an Obligation made to her Husband the Teſtator; The Defendant pleads a Recovery by the Teſtator upon the ſame Obligation, and that he was taken in execution, and that the Sheriff ſuffered him voluntarily to eſcape. The Plaintiff replies Null tiel Record of the Recovery; Upon which there is a demurrer. Davenport, That the Judgement was but a conveyance to their matter in Bar, and it ought not to be traverſed. But it was ſaid by the whole Court, That the Judgement in it ſelf is a good bar, if it be not reverſed. 6 Rep. 45. Higgins caſe. The execution upon that, is not but a conſequence upon the Judgement. And without the Judgement, Eſcape is not material for to make the traverſe good. And ſo Judgement was given for the Plaintiff.

Iſſues.

If the King by his Letters Patents grant to the Corporation all Iſſues within any places; The iſſue that the Corporation it ſelf ſhall forfeit, ſhall be excepted by intendment of law. For otherwiſe it would be a defrauding of Juſtice; For then the Corporation would never appear. Which note in the Caſe of Dean and Chapter of Ely.

Provender againſt Wood.

PRovender brought an action upon the caſe againſt Wood, For that the Defendant aſſumed to the Father of the Plaintiff upon a mariage to be ſolemniſed between the Plaintiff and the Daughter of the Defendant, to pay him 20 l. And it was agreed by Richardſon and Yelverton nullo contradicente. That the action well lies for the ſame. And the party to whom the benefit of a promiſe accrews, may bring his action.

Mrs. Rowes Caſe.

MIſtris Rowe was arreſted by a capias corpus ad ſatisfaciendum, by a Bayliff in Middleſex, within the Bars in Holborn, which is within the liberty of London. And Hitcham the Kings Sergeant prayed a Superſedeas, For that, that the arreſt was falſe. And the Court agreed, that a Superſedeas cannot be granted. For a Superſedeas it cannot be alleged Executio erronioe emanavit, but there the Execution is well granted. And if it be returned by the Sheriff generally; It ought to be intended well ſerved; although that the Affidavit be made to the con-

contrary. But in this caſe a Corpus cum cauſa ſhall be granted. Mich. 3. Car. Com. Banc

Booth againſt Franklin.

BOoth Farmor of a portion of Tithes for 5 years; without Deed demiſes a Farm which he had in the ſame Parish to Franklin for years; and afterwards he libells againſt him for tithe of that Farm. And Franklin ſaid he was not Farmour. And Henden prays a Prohibition for that.

Firſt, That the Leaſe for Tithes is without Deed: but he may be diſcharged of his own Tithes without Deed; As was adjudged before in this Court.

Secondly, the Leſſee is not to pay tithes for that Farm. For although the Parſon makes a Leaſe of the Glebe for years, he paid tithes; But if a Layman who had the impropriation leaſes the Glebe, the Leſſee does not pay tithes. But the Court denied the caſe of the leaſe of the Parſonage impropriate; And ſaid that the caſe of Perkins and Hinde was adjudged to the contrary in that very point. And alſo if he purchaſe other lands in the Parish (which are diſcharged of tithes in his hands) and he demiſes them, yet the Leſſee pays him tithes. And the opinion of the Court was, If one contract with the Parſon for diſcharge of the Tithes of his lands for years, and demiſes his lands to another; yet he ſhall not have tithes, but the diſcharge runs with the land. But if one take a leaſe of his Tithes by deed, and makes a demiſe of his land, he has tithes of the Leſſee. And the direction was, that the Leſſee of the Farm ought to ſhew expreſly in the Eccleſiaſtical Court that the Farmour had not a Leaſe by Deed; and a Prohibition was granted. And it ſhall be admitted, that the words of the libell being Firmator, conductor & occupator was good.

Ralph Andrews againſt Bird.

ANdrews brought an action upon the Caſe againſt Bird, and delares that Bird ſued a Treſpaſs in this Court againſt him; and upon not guilty pleaded, the iſſue betwéen the aforeſaid Ralph Andrews, and Robert Bird was tryed at the Aſsiſes, &c. And that there Andrews ſhew'd in evidence a Deed of feoffment concerning his Title, and the verdict paſſed for Andrews. And afterwards Bird ſpoke theſe words (ſcilicet) That Andrews procured the Deed to be forged. And upon not guilty pleaded, it was found for the Plaintiff. And Atthowe moved in arreſt of Judgement.

Firſt for that, That in the Record it was entred that the Iſſue was inter prædict. Robertum, where it ſhould have been Radulphum.

And ſecondly that the words were not actionable. Richardſon ſaid, as to the miſtake, it was helped by the word aforeſaid. And although that it was inter prædict. Andrews, it ſhould have been well; For it cannot be intended, but the ſame Andrews. And Crook Juſtice cited Dyer 260. Cook and Watſons Caſe to be the ſame Caſe, and 11 H. 7. Penningtons Caſe, That the words were actionable; For the Statute puniſhes forgery, and the procurers of forgery. And it is all one, although he did not ſay falſly procured, as the preciſe words of the Statute are; Yet it ſhall be intended, that that is implyed in the word Forge. But if it had been ſaid, the Deed given in evidence was forged, that was not actionable.

Wood

Mich. 3. Car. Com Banc.

Wood againſt Symons.

VVOod againſt Symons in a Prohibition, in which Symons libels for Tithes of Hay. And Wood ſuggeſts for the Prohibition, That he uſed to pay tithe of Hay in ſpecie, in conſideration whereof he uſed to be diſcharged for all Doles, Green-ſkips, and Headlands, not exceeding the breadth that a Plough or a Teame might turn about the Lands. And Henden moved for a Conſultation; For that it is ſaid about, &c. that is circa terras arabiles. When the truth is there are Skips at the ſide of Lands, as broad as the Lands themſelves; and then he would be diſcharged of them alſo. Whereas it ought to be at the end of the Headlands only. Richardſon ſaid, that in arable lands incloſed, Paſture is at theend and at the ſides, which is mowed, and yet diſcharged of tithes. But the Court in reſpect there was a Prohibition granted ſaid, That he ought to joyn Iſſue or demurre upon the Declaration.

Summons.

IN a Writ of partition after the Summons an Eſtrepment was granted, and generally againſt the Parties and their ſervants. For in partition no dammages are to be recovered. Quod nota.

Eſcape.

IF a Sheriff remove his Priſoners out of the County without being commanded, it is an eſcape. But if he remove them from one place to another in his County as he changes his Gaol, it is not an Eſcape: But if he remove priſoners for their eaſe and delight in the ſame County, it is a Eſcape. As the Caſe was cited by Harvy. That one went with his Priſoner to a Bear-bating in the ſame County. And it was adiudged an Eſcape. And Hutton Juſtice ſaid So that if a Sheriff permit his Priſoners to go to work for their benefit, it is an Eſcape. And the Queſtion was, if in an Audita Querela for a voluntary Eſcape of one in Execution, there ſhould be bayl; and the opinion of the Court was, That if it appears, That the Cauſe upon which the Audita Querela is grounded, is called a good proof by the Record, and that he ſhould not be bayled, unleſs good and ſpecial bayl.

Duncombe againſt Sir Edward Randall.

IN an action upon the Caſe betwæn Duncombe and Sir Edward Randall for diverſion and ſtopping of a River, It was agreed by the Court, That if one had antiently Ponds which are replenſiht by Chanels out of a River, he cannot change the Chanels, if any prejudice accrew to another by that. And yet the effect by preſumptions, is to have the Ponds fed out of the River. But ſic utere tuo ut ne lædas alieno.

The Vicar of Hallifaxes Caſe.

A Chaplain that was under the Vicar of Hallifax, libells againſt him for his Sallary. And he preſcribes that the Vicar ought to pay the Chaplains four pounds a year, And the Vicar prays a Prohibition.

Firſt, for that he alleges, That the Chaplains were eligible by himſelf;

And

And becauſe that Chaplain was not elected by him, he is not Chaplain; But he is in of his own wrong, &c. *Trin. 3 Car. Com. Banc.*

Secondly, That preſcription for Gallery was tryable at the Common law. Yelverton, the Gallery is ſpiritual, as the Cure it ſelf is ſpiritual, for which it is to be payed. As the Caſe in Dyer 58. Pl. 4. But a Prohibition was granted, untill it was determined to whom the election appertained. And that now depends by Prohibition in this Court.

Aſſault and Battery:

TRespaſs of Aſſault and Battery was brought againſt two, and the one of them appeared, and a Verdict was found againſt him; The other was in the inſimul cum. And dammages were tared againſt him who appeared. But the Court by view of the Plaintiff, increaſe the dammages from 30 l. to 40 l. And afterwards a verdict was given againſt the other Defendant, and dammages alſo were tared. And Thime moved that the other Defendant had murdered the Officer who came to ſerve the Execution upon him for the 40 l. And ſo they by poſſibility might recover nothing againſt him, that the Court would increaſe the dammages againſt this Defendant upon another view of the wound. But the Court denied that; For they can have but view one time in this Action. But if they had brought ſeveral Actions then it had been otherwiſe. But he directed him to ſtay all untill the firſt Defendant was hanged. And then they may make a view and increaſe the dammages.

Margery Rivets Caſe.

AJudgement in Debt was brought againſt Margery Rivets Adminiſtratrix, durante minori ætate of her Son. And in a Scire facias againſt her, ſhe pleaded in Bar, that ſhe was Adminiſtratrix, &c. and that ſuch a day her Son came to full age (ſcilicet) 17 years, and that after ſhe refuſed before the Ordinary; And that the Adminiſtration was granted to a Stranger; And that ſhe had delivered all the Goods in her hands at the time of the Writ brought or after, &c. The Plaintiff replies and confeſſes all the Bar: But that before the delivery of the Goods, and Adminiſtration granted by the Ordinary (devaſtivit) and does not ſay that prædicta Margery devaſtavit. The Defendant joyns Iſſue Quod prædict. Margery non devaſtavit. Which was found for the Defendant. And Hitcham the Kings Sergeant moved in arreſt of Judgement; For that, that there was no Iſſue. For every Iſſue ought to be returned certain, and the Iſſue grows upon the affirmative; Then the word of the Defendant quod prædict. does nothing, for the affirmative makes the Iſſue. Coo. Counteſs of Salops Caſe. A Bar may be taken upon Common intent. But a Replication ought to be preciſe and certain. In the Exchequer Chamber. Tho. Harris's caſe. One pleads that he was ſeiſed of White acre and Infeoffac,. And adjudged naught, for it ought to have been feofavit inde. For he may be ſeiſed of White acre, and enfeofft of another acre. And alſo it may be ſaid, that another devaſtavit, although that the wife was Adminiſtratrix. Atthowe obſerved all the courſe of the Record; there is not a word of Margery in the Replication, but only in the recital: But ſays ante diem quo devaſtivit. And the Replication cannot be taken by intendment, and it cannot be amended; For it is not vitium ſcriptoris, nor is it ſo much as ipſa devaſtavit. But if it had been ſaid that prædict. Margery had Goods in her hands, ſexto Decembris, et devaſtavit, then it ſhould have been good. Crook. She ſaid, that ſhe delivered Goods to another Adminiſtrator,

and

Mich. 3. Car. Com. Banc.

and then he replies, that before that time devaſtavit. It cannot be intended that any other Devaſtavit but the Wife. And Hutton ſaid, that that ſeemed to him to be good. But Yelverton replyed, that it did not ſeem to him to be good, and it cannot be intended Margery. The Replication is the Title of the Plaintiff, As upon a ſcire facias without a precedent Judgement. For the Duty of the Plaintiff is when the Defendant had confeſſed himſelf to be ſubject to his Charge one time, As in debt upon Arbitrement; and the other pleads no arbitrament made. And in point of arbitrement to pay mony, It is not ſufficient for the Plaintiff to ſay, That the mony was not paid at the day: But he ought to affirm that the Defendant had paid it, &c. And ſo there alſo Margery is not named affirmatively in all the Replication. For if her name had begun any ſentence, then ſhe might be intended. And although it be now after verdict, yet the verdict will not help. So it was adjourn'd for the preſent.

Robert Barret againſt Margaret Barret his Mother.

RObert Barret brought an action of debt againſt his Mother, for an Obligation made to him, the Condition whereof was thus. That ſhe ſhall perform all that part of her Husbands Will, that of her part is to be performed, and obſerved concerning the Goods, &c. And that ſhe ſhall uſe, occupy and enjoy all the Lands and Tenements to her demiſed, according to the true intent and meaning of the Will. The Defendant recites the Will, which was, that her Husband gave her one Meſſuage and Land for her life; Excepting all the Timber Trees and Wood. And further will'd, That ſhe make no waſte nor eſtrepment in the Houſes, Lands or Timber-trees, nor her Aſsigns nor any other for her. And further will'd, That if ſhe ſhall happen to do any ſuch waſte; That then ſhe ſhall pay to Robert Barret the double value of that to which the waſte ſhall come or amount unto; Being indifferently valued by two choſen by themſelves. And furthermore he willed, That there ought to be forty load of Wood per annum, taken for fewel upon the Land demiſed, of ſuch Trees which have been uſed to be lopped for 30 years before. And ſo ſhe pleaded, that ſhe performed the Covenant in all, &c. And the Plaintiff replies, that the Defendant had decouped a Grove of Wood, containing by eſtimation one moyety of an acre, and 6 Elmes, and 20 Beeches and Sallows, and Maples, and Thorns, being of the age of 33 years. Whereupon the Defendant demurred. But Atthow argued for the Defendant, and he ſaid, That there is not any breach of the Obligation alleged, all Timber-trees are excepted; And becauſe when ſhe cuts them, there is no waſte, but a treſpaſs to Robert; And the Will is, That ſhe ſhall not do waſte. For if ſhe had entred into other Lands and cut Trees out of the Lands of the demiſe, that had not been a Forfeiture of the Obligation. But it ſhall be objected, That then that clauſe had been void; if his intention ſhall not be conſtrued of waſte to be done in the Trees; Then the ſecond breach is not well aſsigned; For the words are, If ſhe does waſte, that ſhe pay the double value. And then although that waſte be done, You ought to allege that ſhe did not pay the double value: for if ſhe had paid it her Obligation is ſaved. But Hitcham the Kings Sergeant on the contrary. The breach is well aſsigned. The Caſe reſts upon the words of the Obligation, and the intention of the Will: and then the Intention will appear, That ſhe cannot commit waſte in the Trees, although it be excepted. And I conceive it is within the words, for it is that ſhe occupy and enjoy the Lands demiſed as aforeſaid. Now if I grant my Land, I ought to demiſe my Trees alſo. And if I be obliged not to

com-

commit Eſtrepment in my Land, If I pull down a Houſe, it is a forfeiture of the Obligation. For if Tenent at will pulls down, no waſte lies againſt him, But he ſhall be puniſht by an action of the Caſe, for it is deſtruction and waſte at the Common law, In any of the Houſes, Lands, or Timber trees. And what Timber trees may be meant, But thoſe are excepted, when all are excepted. Dyer 323. Pl. 29. After the Statute of 23 H. 8. Nothing was left in the Feoffees al uſe. One would ſtand ſeiſed with his Feoffees to the uſe of I. S. And adjudged that that is a good demiſe of the Land. Ed. 6. conveys the Manor of Framingham in fee farm, and afterwards grants the Fee farm: and the Grantee demiſes his Manor of Framingham, & the Fee farm paſſed; for that that it was uſually called by that name. And Thorntons Caſe 3 El. He gives all his Land that he purchaſed of I. S. And he did not purchaſe any of I. S. but I. S had conveyed it to I. D. of whom he had purchaſed. And adjudged good, Sir Edward Cleeres Caſe, Co. lib. 6. 17. So there it ought to be of ſuch waſte, as he in his apprehenſion eſteemed to be waſte. But it may be objected, that ſhe did not pay the double value. But I conceive, That if you will that that be paid, yet the Will is broken. For if you will by one clauſe that ſhe commits not waſte, and by another if ſhe do, that ſhe pays the double value, and ſhe does not pay it, ſhe breaks two clauſes. That ought to be pleaded by you. If the Statute prohibit a thing, and if he offend againſt it, that he ſhall pay, &c. I ſay that he may be indicted upon the very Prohibition. So that you would ſhew this in excuſe of Waſte. But I conceive that it is not excuſed upon the Statute of H 6. Richardſon chief Juſtice. All the Obligation goes to the intention of the Will, which may be collected by circumſtances out of the Will. And then the ſix Elmes are meerly the others, not the Saſſafras, Maples, Beeches, and Thorns, by which the intention is broken. Now the Law will not allow that to be waſte which is not any ways prejudicial to the Inheritance. So when the Husband ſaid, ſhe ſhall not commit waſte, It was not his intention to reſtrain her from that which the Law allows. Thorns in ſome Counties are adjudged waſte, where Trees are ſcant. But a Grove ordinarily is Under-wood. And then if ſhe committed waſte, the Husband took upon him to impoſe the penalty. And although that ſhe enter into an Obligation, yet it is that ſhe is reſtrained by the Will of her Husband, and he intended it for a benefit by that impoſition of forfeiture: and therefore we ought make a benign conſtruction. And for the Obligation that the non-payment of the forfeiture ought to be ſhewed by the Defendant, I conceive otherwiſe. For the breach ought to be averr'd, as the Will is. And where a breach is alleged for a forfeiture. It ought to be pleaded, ſo that it may be traverſed. Cook on the contrary. If the Obligation be that ſhe perform the Will, then peradventure that ſhall be no forfeiture.

Mich. 3 Ca. in B. R.

Gooderidges Caſe.

AN Indictment of murther againſt Gooderige. There was an exception taken, for that, that the Indictment was; That the ſaid Francis who was murthered ſuch a day, apud quandam Down. vocat. Weſtmen down in Comitat. Hampton, inſultum fecit, & quod ibidem habuit & tenuit quoddam glad. in his right hand, & prædict. Fran. percuſſit, and does not ſay ibidem percuſſit; and for that naught. For it is not a neceſſary intendment, that the perculsion was at the ſame place. Alſo he ſaid, Whereof inſtanter obiit, that is no certainty; But by argument that he died in the ſame place. And for theſe cauſes, and becauſe it was body for body, the Indictment was ſufficient.

p. 119

Mich. 3. Car. Com. Banc.

It was agréed if a Feme ſole Executrix of a terme marry him in the reverſion, and dies, the term is not drowned, but the Adminiſtration of it ſhall be committed. Otherwiſe perhaps if ſhe had purchaſed the reverſion. And it was the caſe of Owen. If the Executrix Debtee marry the Debtor, That the debt is not gone, but the Adminiſtrators other wiſe ſhall have it.

Moor againſt Penruddock.

MOor had a Latitat againſt Penruddock the Sheriff of Wilts, Who returns that he himſelf was Sheriff, and could not be arreſted by any, or impriſon himſelf. As in Plats Caſe; a Feme Gaoler marys a Priſoner, that is an Eſcape; For he cannot impriſon himſelf. Yet the Court ordered that he ought to appear and find Common bayl.

Thomas's Caſe.

AN action upon the Caſe by a Conſtable of a Pariſh againſt Styleing for ſaying, Thou art a bribing Knave, and haſt couſened the Pariſh of Wilden in rates to 30 l.

Hores Caſe.

HOre a Clark of the Common Bench brought a Bill of Priviledge there. And the entry was, quod prædict. Hore per Tho. Maun Attornat. ſuum obtulit ſe. And Judgement given, and upon that Error: For among Clarks of Court, their appearance ought to be in proper perſon.

Fawkner verſus Bellingham.

1 Cro. 80. 214 and 28 1 Ro. 233

LE caſe de *Fawkner verſus Billingham* fuit ore argue per les Iudges. Et *Yelverton* teigne que ſeiſin neſt requiſite, et pur ceo neſt deins le ſtatute de 32 *H.* 8. 2. et ceo pur 3 reaſons, primo pur ceo que le ſtattute de primo *E.* 6. eſt le title ſur que le Avowry eſt fait car le defendant ne poet conveyer ceſt rent al lui ſans monſtre le ſaueing dems ceo ſtattute car ſans le ſaueing touts les ſerviſes ſont merge 27 *H.* 8. Parlament. *Alton Woods* Caſe primo rep. 47. Et avowry ore ne ſeroit come fuit al Comon ley mes ſur tout le matter *Dyer* 313. *plo.* 91. Et il doet declarer tout ſon cawſe come eſt in un Accon dl caſe cenx choſes doient monſtre: primo doet monſtre tout le ſtattute, &c.

Secundo il doet monſtre que le Roy ad bone title al ceo terre come Chauntery terre, &c.

Tertio que le party que claime ceſt rent eſt perſon deins le ſaueing, &c.

Quarto que il neſt deins aſcuns des exceptions dl ſtattute, et ceux doet ee monſtre in *ſecula ſeculorum* cy mults foits que il diſtraine. Et ſur ceo ſon count eſt ſur le act de parlament. Et ſi arreages fuerout al le Suor. devant ceſt ſtattute le Snory eeaut per le ſtattute extinct que iſsint fuit perde come 4 rep. donque le rule dl ley eſt ou Avowry on, &c. eſt ground ſur le matter de record. ne ſeroit weaken per future temps in matter de fait quelcumq; Quare Impedit per effluxion de temps fuit ouſte, &c. per 32 *H.* 8. ſi ne ſoiet vide per le ſtattute de primo Marie cap. 5. a. mes ſi divers Coparceners voient faire partition a preſenter per lour turne in ceſt Court

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per bre. de Covenant on droit de Advowſon ils poient aver ſcire facias 100 anus apres ſur ceſt compoſition car eſt per matter de record come ſi recovery ſoiet ewe Scire facias giſt ſur ceo in eternum 33 *E.* 3. title & 3. et i 4. 6 *E.* 4, ii. Annuity per preſcription eſt deins le ſtattute de Limitations mes ſi ſoiet un foits recover Scire facias giſt ſur ceo al aſcun temps car le declarer ſur le record et ne ou le Annuity ſuit done, mes on le record eſt ſcilicet in *Middleſex.* 18 *E.* 4. 18 et 19 *E.* 4. 1. les records del Court ſont appel le Treaſury dl Roy donque le Treaſury dl Roy continue touts foits, et eſt currant in touts ages iſſuit de records, &c. Keiell. 123, Common uſe ſans temps de memory oue un mannor ſi fuiſt graunt per office al primer: ne poet ee clime come appendant pur ceo que eſt per fine: Et pur ceo ſi le ſtattute de 32 *H.* 8. navoit limitte le temps dl Scire facias ſur fine poet auer al aſcun temps mes ceo eſt denis, les expreſſe parolls del Stattute, nul auter Scire facias eſt denis ceſt ſtattute: ſecundo diverſity eſt inter le inlargement de temps ſur ceſt Stattute & ſuſpenſion il agree *Collins* Caſe Coment. 32 i. que in Caſe de Quare Impedit & raviſhment de gard &c. que eſt nul Equity per Conſtruction, des Judges poet gainer temps ouſter les ſtrict parolls dl Statute. Et *Dyer* 266 mes ſe ſuſpenſion eſt autrement car Grauntor et Grauntee per lour agrecment poet ſtoppe le Glaſſe que le temps ne incurger cy ſwiſte come eſt in 4 rep. 11. Si Suor releaſe al ſon Tennaunt ey long que *J. S.* avoit heires de ſon corps et 60 anus paſſe et *I. S.* devye ſans heire del Corps et uncore il poet diſtrainer pur le temps per les partyes et ſuſpend et poet ee auters Caſes. Si Sinor voloit releaſor ſon Tenaun diſtreſſes pur 60 anus ſil poet aner apres ſans ſeiſin, deins 40 anus car le Su'or durant ceſt temps ne poet compeller le Tenaunt a paier les ſervices. Et que ceſt eſt bone releaſe 1 *H. H.* 4. 1. et 4. ſi nul diſtreſs eſt iur de terre pur 40 anus il port diſtrainer al fine de 40 anus Lex non cogit ad impoſſibilia. Et iſſuit ſi le Tenaunt voet releaſor le Tennancy al Signeour pur 60 anns le Suor poet apres diſtrainer. Et ſi deux Coparceners ſont et un in vie dl pierpur chaſe rent charge de liu in Fee et il devye ceſt rent eſt ſuſpende tanque partition ſoiet fait coment que ſoiet apres pur 400 anus diſtreſſe. eſt loiall pur le rent que eſtore revive. Et donque ſi Grauntor et Grauntee poet ſaue ceo per lour aſſent a fortiori poet ee fait per aſſent de Act de parlament car 4 choſes ſont Aſſent: per act primo que le rent ſerroit ſave.

Secundo que ſerroit ſeuer del ſigniorye et deveigne rent ſeck, &c.

Tertio que touts former ſeiſins ſerrout fruitles car eſtoiet come rent ſaue per parliament, &c.

Quarto que le ſtattute done nul diſtreſſe pur ceſt rent vncore les Iudges done diſtreſſe pur ceo car le ſtattute ſane ceo et one le remedy aver ceo mes ceo neſt done per le ſtatute mes conſtruction des Judges. Et iſſuit le conſtruction ſur primo *E.* 6. overrule le ſtattute de 32 *H.* 8, &c.

Secundo neſt deins le intent pur ceo que le ſtattute ne extende al aſcun rent mes ſeiſin doet ee neceſſariement alleadge come in rent ſervice eſt neceſſarye 26 *H.* 8. *Com.* 94 5 *E.* 62, et 63, et 13 *H. aſſiſe br.* 60, &c. Et donque ne vnque ſeiſine apres le ſtattute de Limittation eſt bone plea. Et in cenx on le comencement neſt ſcavoy de eux come Annuity per preſcripſion hors de Coffers on Corrody & icy ſeiſin eſt properment dee alleadge et ſont denis le ſtattute mes le comencement de ceſt rent ſcavoy ſcilicet per primo E. 6. mes jeo ne intende que eſt novel rent mes veiel rent one novel privilige car ore eſtoiet per lui meſme on fait parcel dl ſervice.

Secundo ceſt rent.

Tertio nul diſtreſſe de common droit eſt incident al ceo come fuit devant per le privity inter le Owner dl rent, et le owner dl terre. Et le diſtreſſe eſt annex all ceo per Conſtruction, des Iudges a ſatisfye les parolls del ſtattute. In ma'nnor ſuch like forme and Conditions as if this ſentence had never been made, &c.

Quarto ceſt rent eſt ſupport ſans ſe ſeiſin et e'eant devant reſtrain per

Trin. 3 Car. Com. Banc.

Mich. 2. Car. Com. Banc.

le ſtattute de 32 *H.* 8. ſeiſin eſtore per primo E. 6. Auter act miſe alarge arrear et ceſt rent eſt parcel dl ma'nnor come ſuit devant et poet paſſer one le mannor ſans fait come le caſe de 31 *aſsiſe plo* 23. 1 *H.* 4. et 22 *aſſ. plo.* 53. 30 *E.* 3. Stathum. Warranty. Tertio eſt meſme rent in continuance deſtate fait Fee-ſimple: Et eſt mes a ſairer ceo al. le ſtattute de Limitations eſt oppoſitum in ſubjecto. Et les parolls ne ſane le rent in le meſme mannor', &c. oue ceux differences ſont ſatisfye car auterment vous comitmuks abſurdityes ſcilicet que continnue rent ſervice et que le Signiory continue mes les Conſtruction eſt que le rent continue al le prim. Owner cy liberall pur eſtate et remedye cy free pur perception come devant imo melius car ore il poet diſtrainer al aſcun temps et eſt pluis fort que ſi le diſtreſſe ſait expreſſement done per le ſtattute car donque poet e'e releaſe mes ceſt diſtreſſe donque per conſtruction ne poet e'e releaſe car la ley create ceo come vn hand mayden al waiter ſur le rent.

Mes voet e'ee demaund hors de quel wombe ceſt rent ſeck iſſue, &c.

Reſpons hors de nul wombe forſane le wombe dl Parlament et primo E. 6. unde ſequitur que rent ſeck eſt ſcavoy a aner commencement et donqne un originall eſt ſcavoye eſt hors ſtattute 8 rep. 64. pur ceo que ceſt ſtattute ſuit fait pur deux reaſons, &c.

Le primer que Jurors nedoient e'e trouble al ſearcher in temps incertain, &c.

Le ſecond que dormant Titles poient e'e dettermine.

Le third le ſtattute de limitations *Merton* cap. primo *Weſtminſter* le primer cap. 39 *Weſt.* le ſecond cap 26 coment que ceux ſtattutes confine al certain temps uncore ſi le comencement de choſe poet e'e monſtre al le Court fait hors de eux. Et ore le ſtattute de 32 *H.* 8. ſweepe touts ceux ſtattutes awaye come Limitations, 45 E. 4! 63. ſi apres le ſtattute de limitations de aſſiſes et devant le ſtattute de Quia Emptores terrarum Aunceſtours de *I. S.* ſoiet infeoffe dl terre tenus de Feoffor per ſealtye ſet rent et Avowrye et fuit pur ceo rent ore ſi le ſpecial matter ſoiet monſtre per quel appeirt quant on Surye commence ciy eſt nul plea que Suor ne fuit ſeiſie apres le ſtattute de Limitattions de Aſsiſes car le Court doet indger de ſpeciall matter diſcloſe et le ſeiſin de tiel reut ne unque ſerroit traverſe & 21 *H.* 7. *Kell* 31. per Reade mes ſi rent ſurvive ſoiet ſait ſans date devant temps de memory. Si le ſait ſoi et de 20. *s.* et ill ne unque ſuit ſeiſe forſane de 10. *s.* que non unque avoit ne unque ſeiſie eſt bone plea.

Et pur ceo il eſt miſe al l bre de cuſtomes et ſervices et uncore ceſt rent eſt intire. Et ſi home tient dl Roy imediatement, et il voet obtaine Licence a faire Feoffment a tener de lui meſme come eſt uſuall, & il fait Feoffments rendant rent et Fealtye ceo eſt cleerement hors dt Stattute de 32 *H.* 8. pur ceo que eſt novel tenure et le Licence eſt touts ſoits ſur record in le Chauncery et pur ceo que te comencement de ceſt rent. Eſt Cogniſe eſt hors dl Statute.

Tertio le Stattute de primo *E.* 6, ſerroit conſtrue liberallment pur ceo que va al ſupportacon de rent que eſto et oue common droit. Et ſout three kindes del acts de Parlament primerment eſt de creation: Secundment Confirmacon. Et Tiercement preſervacon et de ceſt darraine kinde eſt primo E 6. ſi ceſt act de Parlament avoit ee done rent per expreſſe parrolls ſans queſtion ſerroit hors de 32 *H.* 8. donque ceo ne, ſcavoy pur que ne ſerrit pur le plt ceant ſane per le Stattute. Et ne fait le intent de ceſt Stattute a ſauer ceſt rent pur temps infinite, et ſuffer ceo a devoigne fruitles pur temps finite ſi le rent navoit ee paye pur 100 amis eſt ſane per le Stattute et payment per le Tennaunt a volunt revivor ceo cap. 11. 5 *E.* 4. 7. *E.* 4. 22. *E.* 4. 7. mes ſeo agree que payement de tiel rent per mon bailie neſt bone dauer ſeiſin. 5. *Rep.* 56. ſil navoit mon Licence Et eſt diverſitye inter Ordinaunce fait per act de Parlament per parroll affirmatine & Com. 113. Su noſtre caſe le Stattute de ceo ſuit pluis que le common tey puiſſit ſane cur le Com-

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mon ley avoit deſtroy te Snorry *Kell.* 131. Statute de de Marlebridge annex le ſuite de touts les Coparceners al eigne ſoer ceſt ſuite eſt hors dl Statute de 32 *H.* 8. pur ceo que te Stattute avoit iſſuit annex, ceo al eigne que il preſerve ceo al Snor: de lui touts foits a fortiori lou ceſt rent eſt ſane per un Statute pluis darraigne que ceſt de cy hault nature que le Statute de 32 eſt et ne ſaueing eeaut de ſi mult. Judgement car ſi le rent avoit ee releaſe al Chauntery Prieſt, one condicon avoit ee iſſuit ſane *Dyer* 252. Car le ſtattute intend a ſaner lou ſuit, droit et poſſeſſion et nemy droit ſans poſſeſsions mes *Crooke* Juſtice contra lui: ne Poet ee deny mes devant le Stattute de primo *E.* 6. ſuit bone plea in a vowry pur ceſt rent ne unque ſeiſu & le queſtion ore eſt on le ſtattute de primo priſe ſeo hors de 32. Avoit ee priſe que eſt rent preſerne per le Stattute de 1. Et ſi avoit ee expreſs excepcon de ceſt rent ſerroit bone ſans ſeiſin a quel jeo agree mes jeo dye que ceſt reut neſt done ou preſerne per le Stattute ſi ne Poet prender ſon temps car vigilantibus, & non dormientibus ceſt reut eſt channge per primo mes nemy novellment done non eſt res alia ſed alterata et ore eſt reut Secke, diſtranable mes ceſt Alteracon deveigne deins temps de memory, mes quomodo conſtat quant ceſt rent commence, donque eſt de touts les caſes miſe per *Telverton* Dyer 133. *Alton Woods* Caſe 1 Rep. 47. 8 Rep. 118. & *Strowds* Caſe Latitat que co ment que ſoiet preſerue uncore il ne Poet aner ceo come devant mes la ley intende a fairer eeo come matter de profit al Snor in tiel mannor. Et jeo denye le caſe que ſi Arreages fuerout done devaut le Stattute que ſoit perde car le ley ſane le reut come ſuit devaut mes ceo neſt quoad le profitte mes quoad le tenure: Voier eſt que le avowry eſt change car doet avowe ſnr tout le matter donque le reut vucore eeaut in point de a owrye car avoit come devant, ſeiſin eſt touts foits requiſite. Et jeo agree touts les caſes miſe de *Scire facias* ſur record il Poet aver enx al aſcun temps pur ceo que il ne vaier pluis onſter le Record. Mes ny in Monſtrans ſou Title il doet vaier le Stattute de primo, et monſtra ſon tenure procedent le act de Parlament; et ceo eſt ſon title ex commencement dl Tenure oue ne appeirt car donque le reut ne Poet ee parcel dl mannor, come eſt agree dee et le monſtrans dl act ce primo eſt pur ceo que il doet avower ſur le matter donque quant il declare ſurreut nemy create per ſait on record mes doet alleadge ſeiſin d. vant le Presbitery diſſolue per touts les litters la ſeiſin doet ee travers 22 *H.* 8. 63. 35 *H.* 6. Avowry. Seiſou avowry eſt le principal choſe 14 *H.* 4. 2. record. Long 4 *H.* 6. 2. differt le difference la eſt que ſi ſingle perſon teignant, per rent in avowry, ſeiſin doet e'e allege per maynes de aſcun' perſon ſi per Corporation auterment eſt el ſeiſin alleadge generallment eſt bone 27 *H.* 8 4. Et ao coment que avowry eſt chainge del perſon ſur le terre per le Stattute de 21 *H.* 2. uncore eſt alleadge 30 H. 6 Avowry 15 la eſt dit que ſeiſin eſt le poſſeſſion 9 Rep, 24. expreſſement pur avowry eſt poſſeſſory Action ſeiſin eſt le ground de veſtre Accon. Et ſi ne pores maintainer te ſeiſin alleadge te Accor fait pur ceo ny ſeiſin ne eeaud alleadge ſon title ſaile; mes il ditque poies ſcoviour le Commencement de ceſt reut voier eſt que ſi Poet ee monſtre per fait ou record le tempr dl commencement donque per contra formam. Foffamenti, on per monſtrans del ſait poies bar le avowry Com. 9. 4. ſeiſin doet ee traverſe & conſeſs ou avoyd, et ceo eſt forſque deux voies. primes per coherſion de diſtreſs, ou per monſtrans ſait dl tuncore aſcun Livers teignant in ceſt caſe que vous eſtis miſe al contra formam Feoffamenti come Long 5 *E.* 4. 16 *E.* 3. Avowry uncore ceo concern que le monſtrans dt fait eſt bien per lui meſme 10 H. 7. 11. 44 *E.* 3s Avowry 76. Et auxi ſeiſin per Coheire nad lier 12 *E.* 4. 7. et 5 E. 4. 28. 30 *E.* 3. 5. donque ceſt Act de Parlament neſt done novel rei mes de touts choſes ewe devant et nemy create mes ſaueone les Quallities come ſuit. Et ieo agree, que le reut coment ſeiſin ne unque ewe pur 100 anns devant eſt in eſſe de ſane per le ſtattute ſi ſeiſin fuit nnque ſait Auxi le Stattute ſuit fait pur le eaſe des Subjects. Et pur ceo le caſe in les Com-

Mich. 3. car. com. Banc.

Mich. 3. Car. Com. Banc.

Com. 37:. eſt que leſtattute de Limmittacons et fines fuerunt fait ſur un reaſon ſilicet pur le quiet del ſnbject. Et ne doient ee conſtrue per imaginacon des Judges mes tolonque le parrolls del Stattute, et lou fuit dit que ceſt Stattute ouſte les former Stattutes de Limittacons mes jeo denye ceo mes il done un ſhorter cutt : Et veies le common ley devaut cenx Stattntes. *Bracton dit.* 52. que longa poſſeſſio quaſi ſunt me poſſidendi & iſſuit que ceſt Liner account de long poſſeſſion come de droit *Glanvile libr.* 3. *cap.* 14. le limitacon de Avowrye fuit *Weſtminſter* 2. Et donque 32. plius ceo reſtrain, donques quant ley regard le poſſeſſion, et le ſeiſin : eſt le poſſeſſion ſi ne unque avoit ſeiſin ſemble que navoit droit 8 *E.* 1. 18 *Horne :* et jeo denye le caſe que ſi navoies ſeiſin per temps hors de memory que ne poies vuque aver ceo Car ſil gaine ſeiſin on le Tenaunt conſeſſe eſt bieu mes eſt object que ceo ſaneing eſt un done mes ſaneing eſt reſervacon de choſ in Eſſe devant Com. 563. 35 *H.* 6. 34. per *Danbye* 26 aſſ. 66 le Snor meſine, et Tennaunt : Tenaunt tieut per ſoccage meſne in Chivallrye, le Tenaunt devaut leſtattute de Quia Emptores fact done dl terre ſalvo. Forinſeco ſervitio, et le ſavant ſuit voyde pur ceo qne ſuit in ſoccage 8 E. 3. 67. Avowry 154. 9 *H.* 3. 1. home tieut terres per homage fealtye rent et auter ſervices Et Snor releaſe al Tenaunt ſon ſeruices Et le Tenaunt claime le terre except 15 *s.* Et le queſtion eſt quel rcut ceo eſt et fuit rule ; que eſt rent ſervice ; Et que il avoit fealtye al ceo incident pur ceo que eſt pur le ſaneing : et ſerroit de meſme quallitye come ſuit Parlaments : 776. la le ſaneing ne Poet vaier al choſe que non eſt in eſſe, donque rent reſerve per voy de ſaneing eſt cognize nemy dee done aſcuns ſoits, ſaveing Poet doner come per Stattute de 34 H 8. primer ſeiſin eſt ſane al lui lou navoit devaut.

Et ceo eſt rule lou ſaneing eſt un Act de Parlament de choſe que neſt eſſe devant la potius quam le ſaneing ſeroit idle ſeroit un expreſſe done come ſi terre ſoiet done per Parlament al *I. S.* ſavant al *I. D.* rent de 20 *s.* per annum : hors de ceo que navoit devant ceſt ſaneing done le rent al *I. D.* Et ſi in ceſt caſe le ſaneing a voit e'e del ceſt rent in particular al defendant il avoit comance per ceſt ſaneing mes uncore ſi le ſaneing avoit e'e de touts rents et ſervices in perticular al defendant ſeroit auterment. Et eſt caſe on ſurpluſage de rent eſt al Suor. Et le Suor peramount purchaſe le Tenaunncy ceo eſt ſaneing per comon ley al Suor, et le comencement de ceſt ſaneing eſt ſane uncore in Avowry pur ceſt ſeiſin doet e'e alleadge et auxi eſt traverſeable 2 *E.* 2. extinquiſhment, 20 *E.* 3. Avowry 26 *H* 6. *H.* 67. et *Littleton, &c.*

Mes eſt object que le Parlament done ceſt ſaneing et les Iudges done conſtruction de ceo : mes jeo conceave que le common ley ne voet permitter tiel conſtruction car donq; poet extend al touts rents extinct per le ſtattute de Quia Emptores: Et jeo denye le caſe que ſi avoit ſeiſin devant de ceo come rents ſervice et ceo ne ſeroit ſufficient quaut eſt ſecke car le contra 11 *Rep.* 11 et 5 *E.* 2. ſeiſin de Roſe eſt bone 20 s. eſt de'e paye apres per 19 E. 3. Execucon 163. *&c.* Darraniement per lauter Conſtruccon cenx miſcheeſes voient follow que touts les Chauntery terres ſerrout rake up arreere et cheſcun voet dire que tiel Chauntery Prieeſt tieut terres de moy per tiel Charge ſans, cauſe on remedy car devaut ceſt Stattute ſuit remedy per ne unjuſt vexes ou coutra formam Feoffament *Fittarzh. na. br.* 10. mes ore per ceſt Stattute vous ouſte le Tenaunt de ſairer ſon remedy ne unjuſt vexes, ne Poet aver pur ceo que eſt rent ſecke. Et in un *Wood* et *Smiths* Caſe ſuit a dindge in ceſt Court que hors de ſon Fee neſt bone plea pur ceo que neſt rent ſervice.

Avoit ee object que ſeiſin de fealty devaut ceſt Stattute fuit bone ſeiſin de rent pur avowry mes ore per le Stattute le Fealty eſt ale pur ceo ſi vous deprive lui de un remedy doies doner un auter mes fuit ſon folly nemy a procures ſeiſin devaut leſtattute de vigilantibus et non dormientibus *&c.*

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& ceo eſt le reaſon dl livers que le plaint ne dira ne unque ſeiſie apres le temps de Limmitacon 1 *M. br.* avowry. 107. Seiſin Poet ee alleadge generallment mes le traverſe doet ee deins 40 anns *Dyer* 315. 14 *H.* 7. 1. per *Brian* 16. *Eliza: Warnings* Caſe, et aux les parrolls dl Stattute de 32. ſont in le negative que null perſon *&c.* car le intention dl Stattute fuit qne homes ne ſerrent appell in queſtion pur ſervices lou le title neſt ſcavoye 5 *Rep.* 12. 4. que leaſe pur anns ſerroit barre per fine pur ceo que eſt a ſtaier debates. Et 6. E. 6 *br.* Limmittacons Coppyhold eſt Barre per le Stattute de Limmittacons. Et le Stattute de 21 *Iacobi* doue le reaſon. Et *Heidens* Caſe 3 *Rep.* 7, touts miſcheeſes doient ee deins le remedy. *Mich. 3. a. Com. Banc.*

Objeccon eſt que le terre eſt in maynes dl Roy de 60 auns eſt ſans remedy ſi ne Poet diſtrainer, apres ſans ſeiſin mes il Poet aner le terre hors dl maines le Roy per peticon. Et *Harvey*, al ceſtui intent et il teigne que le ſaneing in primo que et ne done ceſt rent intant que ſaneing neſt forfaue dl reut hors dl Stattute et vaier ſolemeut al choſes preſeut Com. Wroteſlyes et *Adams* Caſe primo rep *Alton Woods* Caſe, et 17 *Eliza. Dyer* 332. *pl.* 27. Et *Perkins* miſt ceſt ground et ſi vous aves novell reut per voy de reſervacon ne Poet ee per ſavaut mes per parroll reddendo. Et il agree que ſaueing in Act de Parlament aſcun foits Poet doner come in les caſes miſe per *Crooke* donque per ceo ſaneing *in act de Parlament*, il navoit plius que il avoit de vaut mes ſecundo que ceo rent eſt ſolemeut alter in reſpect dl Tenure, mes eſt le meſme in proporcou et parcell dl mannor, et eſt conſeſſe icy in pleading dee parcell del mannor, et tout le alteracon fait eſt ſolemeut del tenure propter abſurditatem come eſt *Dyer* 313. què le Roy teigneroit dl ſubject. Et il dit que les Iudges in *Dyer* 313. ne intend que le rent veigne hors dl Stattute, mes qne le Stattute ſave ceo in meſme le manner come le presbiter primo avoit ceo, et nemy come rent ſervice propter abſurditatem mes que le reut et diſtreſſe remaine, *&c.* Tertio que ceſt diſtreſſe neſt ſolemeut forſque ſou eaſe et iſſuit doet ee lou neſt inter very Snor et very Tenaunt. 2 *H.* 4. 24. 19 *H.* 6. 41. 14 *H.* 4. 17. et 18. 38. *H.* 8. a Avowry. *B.* 113 donque le avowrye ne change ceo. Quarto donque le conſequence eſt que ſerroit deins 32 *H.* 8. Et il agree le difference miſe in Sir *William Foſters* Caſe. 8 *Rep.* 65. et in *Rep.* 108. cited arreere et il dit que ceſt caſe la cite proue ceo mult. Si Snor et Tenaunt ſoiet: le Tenaunt fait done in taile le remainder in Fee la ſi le Snor incroach ſur le Donee il lier lui mes nemy ſon iſſue. Et le reaſon que il lier eſt le ſeiſin donque ſuppoſe que fuit le very Snor et very Tenaunt devaut le Stattute de primo Snor incroach ſur ſou Tenaunt et donque il releaſe diſtres al Tenaunt, et donque le Stattute de primo eſt fait uncore ſeiſin doet ee alleadge ou autermeut vous eaſyement leape over le Stattute et il dit que les livers differe mult in lour caſe de ſeiſin car aſcuns diout ne unque ſeiſie eſt bone plea 24 *E.* 3. 26. 39 *E.* 3. 34. 36. *H.* 6. 25. mes le Concluſion ore per Donor in authority eſt que doet pleade ne vuque ſeiſie apres temps de Limmittacon *Dyer* 315. 4 *Rep. Bevills* Caſe et 9 *Rep. Bucknalls* Caſe eſt agree le diverſity la miſe ſcilt que ceſt Stattute de 32 *H.* 8. doet ee liberalimeut expound pur le repoſe dl Subjects: & voier eſt que *B.* Limmitacon primo dit que ceſt Stattute ouſte les auters Stattutes de Limmittacons mes il intende que avoit priſt le force del auters Stattutes et le miſcheefe ſerroit, ſi tiels reuts come tiel eſt, ou comencement ne Poet ee ſcavoy ne ſerra deins le Stattute que people voieat ee idle et negligent in clamant enx ſi poieat vener et monſtre reut ſur ceo Stattute de primo: et proue ſeiſin devaut le Stattute per le auntient Court rolle, ou Bailiffes Accounts que eſt bone Evidence al Jury come le reut perhapps navoit ee paye pur 100 anns et perhapps Poet ee diſcharge et nul cognize de ceo. Et vucore ſur tiel Evidence il Poet recover per lauter conſtruccon & mes *Hutton* coutra lui: que ceſt reut neſt deins le Stattute de Limmittacons deux choſes ſent dee conſider: primerment coment el in quel mannor ceſt reut eſt ſane; et ore il priſe effect, et avoit ſou birthright in ceſt mannor come

Mich. 3. Car. Com. Banc.

come eſt dl ſaueing. Secundment in quel mannor nature ceſt rent eſtoiet al ceſt iour : Tout que eſt die del auter part adhunc conſiſte de 3 obiections ſolement, &c.

Primerment que ceſt rent eſt novel rent et le comencement de ceo ne poet e'e ſcavoy donque le conſequence eſt ore ſeiſin eſt neceſſary de'e alleadge Et tertio que doet e'e liberall Conſtruction de 32 *H.* Et ils conclude ſur le danger de ceſt Conſtruction, que le Tenaunt ſeroit ſans remedy ſi rent ſoiet claime primerment ceſt ſtattute de primo eſt ſolement confirmation: mes in a ſcun mannor creation de ceſt rent in quantity del benefitte on eſt de'e conſider quel force le ſaneing avoit car eſt agree que ſi jeo done ceo rent donque dehors ceo ſtattute de 32. Et appeirt que ceo rent port effect dl ſaneing quelcunque doet e'e alleadge in avowry et ſans quel na voit title done effect al ceo mes ciy le ſaueing de neceſſity doet e'e alleadge ergo, &c. ſaneing in le ſtattute doet aner conſtruction ſolonque le matter ſi ne ſoiet repugnant. Et le ſtattute intende que les averont lour Suoryes arreere, per le ſaueing in 31 *H.* 8. de Monaſteryes on rent ſervices ſont except et ieo avoy vewe les liuers et arguments ſur 14 *Eliz. Dyer* 313. Et la leopinion de Meade eſt que le terre ſerroit ore tenus de deux Suors et Roy et veiel Suor, Et eſt reaſon que le Tenure ſeroit revive auxi pur ceo jeo agree que le ſtattute primo ſeroit expound liberallment : et compare ceo one auters auntient Stattutes de tiel nature le ſtattute de 7 *E.* 4. cap. 5. eſt expound que ſi Tenauncy veign al roy per attainder, et graunt al auter que le Suory dl common perſon ſerra revive br. Revivor 9. Et uncore le ſtattute eſt penned, come ceo eſt iſſuit que eſt Equity que ils que p:rde lour Suoryes ſans lour default que tiel ſaueing ſeroit liberallment expound Carſi le Suory ſuit extinct per aſcun act dl Suor ceſt expoſition de diſtres ne ſerroit mes ſur ceſt ſtattute eſt expound que il aver diſtres pur ceo et de comon droit & jeo compare ceo al caſe de rent, fait ſur auter ſtattute. Le ſtattute de 27 *H.* 8. de uſes ou ſi home ſoiet ſeiſin de terre al intent a paier rent al eſtraunger le ſtattute fait ceux rents bone, et done diſtreſſe al party pur eux : et nul de ceux rents ſont de deins le Stattute de Limitations, et ſi feoffment ſoiet fait al ceſt iour al intent a paier rent al eſtraunger on, &c. ſi poet deſtrainer ſur ceſt ſtattute coment nul clauſe ſoiet de diſtreſſe come *Dyer* 36. 3 *Plo.* 21, &c. Et ceux rents avoient lour birth right de ceſt ſtattute per cauſe de diſtreſſe done iſſuit eſt in noſtre caſe : voier eſt meſme le rent in tours quallityes beneficial : et in meſme le quantity et parcel del mannor 2 *E.* 2 Extinguiſhment 6. et come eſt in *Bevels* Caſe ſeiſin devant eſt bone ſeiſin : apres ſi ne de veigne rent ſeck perſon act demeſn et le Signiorye fuit dl part le mier le rent vaier al heir dl part le mier mes le Stattute done ceſt Conſtruction : Et le matter de avowry eſt ſur le ſtattute. et eſt tiel avowry que vous alleadge nul ſeiſin que forſque devant le Stattute. Et un tenure devant que eſt ſolement a faire lui able daner benefit per le Stattute, ſi avoit e'e un particular ſaneing de ceo rent eſt agree que ſeroit hors dl Stattute de Limitations. Et jeo die que ore eſt tout un car quant il avoit ſon caſe appear al nous eſt tout un come ſi ceſt rent avoit e'e ſane, car quaunt un graunt eſt generall eſt averrement devant les ludges de un particular de'e deins le general eſt lout un come avoit e'e graunt come le caſe eſt 30 *E.* 3. Avowry on le Roy graunt al Corporation tiels Liberties que auter Corporation avoit, &c. et 6 *E.* 33. *Billiels* caſe et ſeroit icy in Chres: et nemy in act de Parlament, et coment le commencement de rent ne Poet ee conus uncore ceo comiencement eſt ore per ſaueing Poet ee conus come le caſe eſt per *Athowe* quel il agree dee bone ley. &c. Et ſi ſoiet Suor et Tenaunt per Fealty et rent de 20 s. et le Suor confirme a tener per rent de 10 s. eſt fait per le fait et uncore fuit devant. Et ſi Judgement eſt bien ground pur avowry pur ce ſi ce le Stattute de primo participate del eſſee de ceſt rent eſt hors del Stattute de 32 *H.* 8. eſt difference inter rents et lauters three choſes limitte & voier eſt que fuit fait : pur le repoſe del Subjects mes coment que nul conſtitution Poet gain inlargement de temps li-

limit uncore divers choſes ſout hors dl Stattute come ou releaſe eſt fait al te naunt cy long que *I.S.* avoit iſſue de ſon corps, *&c.* Et in le 3 primer choſe reſtraine per le Stattute doet e'e ſeiſin mes in Caſe de rent ſeiſin in ley eſt ſuf- ficient pur ceo in caſe de ſeiſin pur in rent lexpoſition eſt pluis favorablemen- pur les Subjects. Et in *Beovels* Caſe appeirt que ſeiſin de fealty eſt ſufficient ſeſin pur le rent, et uncore le Stattute ſout. That none ſhallt make Titles to any rent, &c. Et *Dyer* 278. ne un al Formedon in deſcen- der car coment le Stattnte eſt al repoſe des Subjects uncore tour droits doet e'e preſerve & coment que fait alleadge on miſchief que le Tenaunt navoit aſcun anſwer car primerment ſil navoit aſun Tenure devant le Stattute ne ſane ceo et pur ceo il poet traverſe le tenure, Secundment ſi ſoiet nul ſeiſin devant le Stattute neſt ſane donque icy ſeiſin neſt alleadge devant le Stattute mes, nency apres car neſt neceſſary de'e alleadge mes on eſt tra- verſable ſi le Roy voet doner Licence a fair Feoffment a tener del Feoffor ſi rent ſoiet reſerve neſt requiſite de alleadge ſeiſin come fait dit mes pur par- ticular reſpons ceo die que ſerva inconvenient que il que perde ſon Suory: per ceſt Stattute de 32 *H.* 8. ſerra confine al certain temps de aver ſeiſin de ſon rent. *Mich.* 3. *Car.* *Com. Banc.*

Ad e'e object que ſi nul ſeiſin ne ſoiet bone plea ſerra difficult a trover ſi Chan ntery terres fuerout charge one les rents per quel Avowry eſt fait quant al ceo jeo dye que 31 *H.* 8. de Monaſteries ou eſt enact que le Roy et ſes Pattenntees teuerout Abby terre diſcharge de diſmes ſicome le Ab- bot eux teigne eſt uſuall iſſue miſe in triall ſi ne Abby fuit diſcharge ou ne- my & non ſolement doet inquire ſil fuit diſcharge ou nemy al, temps del diſ- ſolution come in *Drakes* Caſe eſt in ceſt Court aſcun voile aueriſſue de'e priſe ſolement ſi le Abby teigne terres diſcgarge al temps de diſſolution mes ſur demurrer fuit rate que le Sury doet idquire ſi le Abbee avoit aſcun cauſe a tener les terres diſcharge al temps dl diſſolution car ſi ſic donque le Pattentee ſerrout diſcharge coment le Abbee teigne diſcharger al temps de diſſolution, &c. Et uncore ny tiells iſſues ils inquire de tiel auntient temps come poient deins, ceſt ſtattute de Chaunteryer pur rent due hors de Chauntery terres: Auxi nota que le plt ne poet traverſe ſeiſin in ceſt caſe car neſt alleadge per le defendant et ne auxi, beſoigne de'e &c. *Dyer* 305. 6. mes doet vener eins de ſon part que poet aver advantage dl default dl ſeiſin et il doet demaund judgment dl Avowry, pur default del ſeiſin, *&c.* Admitte que ſuit neceſſary mes qnant al ceo le plt avoit bien plead car il ne traverſe ceſt ſeiſin que fuit alleadge mes monſtre ceo per voy de replication: Mes *Richardſon* Chief Iuſtice argue pur le Defendant. Eſt de'e conſider primerment ſi ceſt rent ſoiet ſaue. Secundment coment eſt ſaue: et coment ſi le rent eſt ſane per primo *E.* 6. ſoiet tier hors de 32 *H.* 8. Primetment ceſt rent eſt ſaue car le ſaueing eſt general a touts rents, &c. which they have, or of right ought to have or might have had. Et ceo eſt untimely et effectuall ſaueing nemy un flattering ſaueing voier eſt ſi rent ſoiet un faits extinct per eſcheate deferre al Roy que ſaueing ne Poet re- vive ceſt mort choſe come eſt 27 *H.* 8. *br.* Parliament 77. mes per ceſt liuer. Et *Davyes* 264. *a.* appeirt que choſe in eſſe come noſtre rent al temps dl fea'ans de un act Poet e'e bien ſaue per un ſaluo: Et nemy ſemble al Dean de *Norwiches* Caſe in *Wallſinghams* Caſe 563. lou leaſes merge ne Poet e'e ſaue per un ſaueing. Et iſſuit. *Dyer* 23 *Plo.* 2. Le Stattute de Mo- naſteries done al Roy terres del Abbots in meſme le plight ſauant droit dl Eſtraungers. Et donque le Abbott de *Ramſey* apres le act graunt le pro- chin avoidance al *Mountagne* Chief Iuſtice que donque ſurrender uncore ceſt de ſaluo ne extend al ceſt future droit et title de Monntague Carper le former part dl act de Abbot fuit diſable a graunter ceo et il cite 313. & iu primo Rep. 47 *a.* et *Kell.* 104 *a.* ore le averment in le pleading que le Suor *Windſor* fuit ſeiſie de ceſt rent per le maynes darraine Presbyter proue per moy que ceo fait rent in poſſeſſion & iſſuit bien ſaue, que neſt ſolement

Mich. 3 Car. Com. Banc.

rent in droit. Et nncore jeo teigne que le rent in droit de quel naver ſeiſin devant le Stattute de primo *E.* 6. uncore eſt ſane per le Startute. Et ſi poies happen ſeiſin apres, le ſtattute & ſi fuerout arreages due devant le Stattute jeo teigne que ceux ſont ſane : Car ex vi termini le Suor *Windſor* doet aver ceſt rent in the ſame Mannor come devant le Stattute et devant ceo il doet aver Arreages. Et neſt ſemble al *Ognells* Caſe 4 Rep. car la le Suory fuit determine per le act dl Suor meſme et donque eſt reaſon ſerra perdue mes icy eſt determine per le Act in ley. Et ſi ceux Parrolls rents in ſuch Mannor ne voient ſane Arreages al Suor uncore ſont expreſſement ſane al lui per auters Parrolls deins le ſaueing. All commodities, duties, &c. deins quel ſans doubt Arreages ſout includes Et jeo ne conceive le reaſon pur que les feaſons de 31 *H.* 8. de Monaſteries except rents hors de long ſaueing intant que fuerout verement due hors de les Abby terres. Et le exception des rents fuit omittant ceſt exception in primo *E.* 6. monſtre de lui de'e que rents ſout ſane icy. Secundment donque coment ceſt rent eſt ſane : car *Crook* ad dit que ſaluo eſt ſolement Parroll de exceptiou et nemy create choſe de novo jeo agree in proper Parlaunce doies aver Parolls de revewing ſi vous create rent choſe de novo create contra reddendo 2 *H.* 3 Graunts 89. Graunt de parſonage ſavant al Graunter preſentation del viccaridge eſt bone 35 *H.* 6. 34. 12 *E.* 4. 1. ſaluo ſane ſolement choſe in eſſe et iſſuit ſaluo dominico ne ſane ſolement le auncient ſervices et releaſe al Tenaunt per fealty et rent ſauant le rent uncore ceſt rent eſt rent ſervice come devant & fealty incident intant que eſt le auncient rent et 26 *Aſſ.* 66 et ouſter coment les Parolls in le ſaueing in primo *E.* 6. ſout ſuch rents. Et ceſt Parroll ſuch neſt Parroll de ſimilitude uncore jeo ceo voile agree que ſout Parolls de fealty, et tant amount come le meſme in quantity profit & temps de payment mes nemy the ſame in formality, et in quallity les Parrolls del Stattute ne alter ceo mes le Conſtruction del ley ſur les Parrolls de primo ad alter ceſt rent ſervice dee rent ſeck ſi fuit devant le Stattute. Tenaunt pur vie dl Suory le remainder ouſter in Fee le rent alera accordaut pius le Stattute ſi Iſſuit ſi ſuory devant fait deſcend dl part le mier loufuit ſur condition de rent pius primo *E.* 6. ſerra, in meſme le plight mes in quallity neſt ceſt rent eſt meerement un rent ſeck : Jeo agree que le veiel ſeiſin ſerve pur ceſt rent quia le Suory eſt extinct per Parlament nemy per le Suor meſme 4 Rep. 11. mes pur ceo que le Parlament ad deſtroy le Suory et ſaue ſolement le reut eſt reaſon que ceo ſerra favour et jeo teigne que primo *E.* 6. done diſtreſs pur ceſt rent deins ceux Parrolls ſane in like manner, as if this Act had not been made. Et in *Littleton* 232. le common ley done diſtreſſe pur ceo que le meaſualty eſt extinct ſans ſon act ; mes ny in noſtre caſe rent eſt novel in natnte et quallitie primo *E.* 6. ſuit ore rent ſeck & eeaunt diſtrainable de common droit, *&c.*

Tiercement ceo teigne que eſt hors del Stattute de 32 *H.* 8. car le Stattute extend ſolement al Avowries & Conuſances, nul Actions & Conuſances ſouts hors de ceo come appeirt per 9 Rep. 33. *Bucknlals* Caſe, & 4 Rep., 11. *Bevells* Caſe Com. 94 & *Woodlands* Caſe, 8 Rep. 64. *Foſters* Caſe, Avowry pur ſaueing Fealty pur covering ſale del Suor ou pur writing ſur liu ſout hors de ceſt Stattute et iſſuit touts accidental ſervices et un uncore les Parrolls ſout ſhall make avowry for any rent ſeck eſt hors de ceſt Stattute, pur ceo que done nul Avowry pur ceſt Charge de rent per fait rent ſervice due per Reſervation deins temps de memory eſt deins ceo. Et jeo teigne encounter *Telverton* que rent per preſcription eſt deins ceſt ley carnient obſtant que ſeiſin doet ee alledage in avowry pur ceo uncore le ſeiſin neſt traverſeable mes les preſcription ou compoſition que eſt le fonndation de ceſt rent 26 *H.* 8. *pla. a.* un Avowry pur rent per preſcripton qne un doet paier lui pur comon en ſon terre la al fine *Fitz herball* : dit que le Avowant doet alleadge ſeiſiu mes jeo teigne que ceo neſt traverſeable & neſt pardon pur default de ſeiſin car uient obſtant que eſt & 14 *H.* 7. primo. Si rent

charge

charge eſt Graunt devant temps le memory & nul poſſeſſion monſtre de ceo deins temps de memory que le Grauntee eſt ſans remedy ceo doet inee intend que ne poet compeller le Graunter a douer ſeiſin mes ſil happa ſeiſin un foits eſt bone & ou apres mency le ſeiſin mes le preſcription doet ee traverſe: Et jeo agree que eſt mult regarded in noſtre ley, ceo eeant de droit. Et que ſeiſin per manes de Stranger ou de un Infant eſt bone come eſt in *Bucknalls* Caſe, mes ceo eſt ſolement in caſes lou ſeiſin eſt requiſite. Et ſeiſin eſt ſolement neceſſary la lou il eſt traverſeable et lou il eſt traverſeable & lou il eeunt ewe per incroachment il liera ſeiſin & verbum operativum deins le Statute de 32 *H.* 8. eſt matter inter very Suor & very Tenaunt pur rent ſervice come *Foſters* Caſe mes noſtre Caſe eſt de de Avowry per rent ſeck & in eeo ſeiſin. Jeo teigne que neſt material. Et jeo teigne que ſeiſin neſt traverſeable mes lou ſeiſin, per incroachment le in *Bucknells* Caſe & *Woodlands* Caſe: le difference ſont miſe lou Tenure ferra traverſe & lou Seiſin. Et ſur tout ceo appeirt que Seiſin neſt matteriall lou incroachmeut ne nomminer donque ceo mitt le Caſe que Suor *Windſor* pius le Statute de primo Ed. 6. uſe incroach un Chien ceo ne noyer le Tenaunt in Avowry pur ceo que le Statnte de primo E. 6. eſt le title dl Suor. Et il poet avow pur nul choſe ſi non ceo que eſt ſane lui per le Statnte mes quant al Caſe miſe per *Harvey* devant le Statute. Suor *Windſor* la incroach 20 s. lou ſon auntient rent fuit 10 s. et donque veigne le Statute ſouth ſavor. Jeo conceive que il in apres bien Avower pur ceſt 20 s. pur ceo que ſeiſin eſt bone Title inter. Suor & Tenaunt in Avowry apres le Statute le Tenaunt eſt laiſe in meſme le plight come Statute troue lui Aux le Statut de primo E. 6. ſane touts ſuch rents as any have, or m ght have had iſſuit que il ayunt ceſt rent per Incroachment quant eſt fait per le Statture ceo eſt ſane al lui, *&c.*

Mes ore eſt a voier coment doies demean vous icy in Avowry pur rent Seck 9 Rep. *Aſcoughs* Caſe monſtre quant avows nemy ſur very Tenaunt doies a vower ſur le matter & mitttomus de rent Graunt per Equallity de partition quel eſt diſtrainable common droit el Poet ee Graunt ſans fait hors de meſme terre quel eſt in partition 33 *H.* 6 & doet intend ſur le ceſt in a que le Graunt 21 *H.* 6. 2. 6. 15. 8 E. 3. 16, &c. Mes ore pur le rent ſi avows ne doies alleadge ſeiſin. Et ſi vous alleadger ceo uncore neſt traverſable mes avowry doet ee ſur le matter. Et Incroachment ne avoyer iſſuit lou meaſnalty neſt conveigh forſque al ſurpluſage ſeiſiu neſt traverſeable Incroachmeut ne noier. Et pur ceo eſt hors de 32 *H.* 8. Et ceo ne ſeavoy Caſes lou de rent ſeck eſt diſtrainable de commrn droit ſeiſin Poet ee traverſe ſi foret alleadge. Et ſi aſcun puiſt ee monſtre jeo ne doubt mes ceo voet ee alleadge per aſcuns des freres & come rent ſur partition attend ſur le terte *&c.* iſſuit ceſt rent ſeck que eſt ſane per ceſt Statute ala one le mannor, et eſt parcel de ceo come 21 *Aſ.* 23. rent ſeck eſt parcell eſt mannor ou autrement le defendant ad Title al ceo, *&c.*

Objection eſt que eſt cy veiel que le comencement de ceo ne Poet ee conus et eſt nul fait de ceſt rent. Et coment ne doies alleadge ſeiſin de ceo in Avowry uncore jeo poy monſtre que navera ſeiſin deins 40 anns. &c.

Reſpons eſt que ceſt rent comence dee rent ſeck per primo Ed. 6. & ceſt Statunte avoit meſme le force a preſerver ceſt rent hors de 32 *H.* 8. come un fait ou record ad eſe. Et le Statute al rent eſt ſicome le prophette que raiſe de mort le fitts dl widdow & done vie al lui de fitts fait in vie devant mes uncore bien Poet ee dit que le prophet done vie al lui iſſuit ceſt rent fuit occide per les premiſes del Statute per 1 E. 6. le ſaueing ſait ceo un in vie que eſt le al me de ceſt rent, Et pnr ceo ceſt ſaluo doet ee monſtre in avowry pnr ceſt donque 7 E. 4. 27, 29. E. 44. St le comencement del Suory Poet ee monſtre ne doet ee alleadger ſeiſin iſſuit de rent et coment que jeo doye in mon Avowry monſtre que la fait ou rent ſervice devant ceſt Statute uncore ceo doye rely ſur le ſaueing de ceſt Statute 35

Mich. 3. Car. Banc. Com.

Mich. 3 Car. Com. Banc.

H. 6. 3, 4. 22 H. 6. 3. Avowry 73. Si Suor confirme a tener per meinder ſervices ſi ſoiet recite in Avowry eſt ſufficient ſans ſeiſin & nul inchroachment pius tiel Confirmation noyer, donque eſt un fait original ou un confirmation ſur in caſe dee hors de ceo Statute de 32 *H.* 8, iſſuit voile le Statute de primo E. 6. *Crook* ad agree ſi le ſaueing ad ee particular de 18 al Suor *Windſor* que eſt que ceſt caſe neſt deins 32. donque averment fait ceo cy certain. Et ſi le ſaueiug eſt ee al le Suor *Windſor*. All rents by which the Land is held of him donque avoit eſt bone: et hors de 32 *H.* 8.

Objection eſt icy eſt generall que nihil certi implicat, &c. mes certum eſt quod certum reddi poteſt come les caſes miſe cite per *Hutton* quel jeo conceave auxi ſur le matter al primes, le Roy graunt eaſdem Libertates que S. avoit Poet ee fait certain per averment que S. ad tiels Liberties, &c.

Objection 32 H. 8. doet ee priſe liberallment. Voier que all Avowries & Conuſances mes le Statute eſt de petit faire car ſi replevin ſoiet convert al treſpaſſe eſt hors de de ceſt Statute 10 H. 6. 1. Long 5 E. 4. 87. Et in treſpaſs poier traverſe le tenure non ſolement le ſeiſin hors dl Avowry in que le Avowant eſt Actor, &c. Objection 32 H. 8. ſuit fait pur le repoſe & quiet des homes, &c.

Reſpons ſolement in Actions deins ceſt Statute & in eux le Statute avera liberall Conſtruction que urors ne ſerra inveigle quel daunger ceſt icy pur ceo que le Statute fait Title ee Accounter & eſt nul miſchief car poies traverſe le tenure ou ſeiſin devant le Statute de primo *E.* 6. &c.

Mes adee dit que Stewards books Courts Rolls ou Bailiffs accounts poieat ee monſtre & port eins pur Title al rents extinct per leaſes ou, &c. uncore jeo die que ceux matters doient ee laiſe al Iury & tiels choſes in eux meſmes ſout bone Evidences. nous veiennus 7 Rep. *Farmers* Caſe que le ſtatute de Fines eſt avoid per fraud & agreement des parties & ad ee confeſſe poier toller. Le Caſe hors de 32 H. 8. come releaſe.

Executrix of Henry Haſſel.

IOne Haſſel makes a Leaſe to H. Raſſel of 3 Cloſes for 20 years, if he ſhould ſo long live. Henry Haſſel dies, and debt is brought againſt his Executor for rent reſerved upon that Leaſe, who pleads that before the day of payment, he aſsigned two of the Cloſes to a Stranger. And upon demurrer Judgement was given for the Plaintiff. For if there had been an aſsignment of Henry: If he did not give notice to the Leſſor in acceptance of the rent, he ſhall be charged. Quod nota.

Iudgement in Debt.

IF Judgement be given in debt, and a Scire facias brought againſt the Executor, who pleads ne unque Executor, ne unque Adminiſtrator, &c. And it was found againſt him, yet it was agreed by the Court that the Execution ſhall be de bonis Teſtatoris tantum. For that, that the Execution ſhall have relation to the Judgement. And the Scire facias is to make known that they had not Execution upon the firſt Judgment, which extends to the goods only of the Teſtator. And ſo it was ſaid by Moyle Prothonotary, that it was rul'd in 5 Iac. in this Court.

If a Judgement be given in Debt, and the mony is paid to the Attorney of the Plaintiff. Although that the mony miſcarry with the Attorny, yet the payment is good. But if a Scrivener is imployed generally to put mony to uſe for a year: and the mony is paid to the Scrivener, who breaks, or does not pay the mony, The payment does not ex-

excuſe the party. But if he receives it by ſpecial Command, &c. that is a good cauſe of Equity. *Mich. 3 Car. Com. Banc.*

In Avowry.

IN an Avowry for Dammages feaſant, the verdict is found for the Avowant; And a Returno habend. granted for the Cattell, and a Capias ad ſatisfaciendum for the Coſts and Dammages are payed. The Sheriff cannot execute the Returno habendo. But if it be executed and Coſts afterwards paid upon the Returno habendo; A Writt De ſi conſtare poterit ſhall iſſue to the Sheriff, for delivering the Cattel, upon a ſurmiſe and payment of the coſts, &c.

A Prohibition.

DAvenport moved for a Prohibition, for that, that an Executor who reſided within the Tower, (which is a peculiar Juriſdiction as it was ſurmiſed) was ſued in the Prerogative Court for a Legacy; and that upon the Statute of 23 H 8. cap. 9. And Henden ſaid, that a Prohibition might not be granted, for two cauſes.

Firſt, The Statute is general, That no perſon, &c. then there is a proviſo, That this Statute does not extend to any probate of Wills in the Prerogative Court. Then a Legacy cannot be recovered in any other Court. For if a Will be proved there, no inferiour Ordinary will meddle with that Will; and alwaies they had the execution of all Wills proved there in that Court

Secondly, It is pretended, that the party is cited out of a particular Juriſdiction. But that is not a Juriſdiction within this Statute. For no Juriſdiction is intended, but where there is an Ordinary; But in the Tower of London there is no Ordinary. But it is but as a Lord of a Manor, who had probate of Wills: which is but a lay Juriſdiction, &c.

Thirdly, There is no Eccleſiaſtical Juriſdiction there. But Davenport replyed, That although for the preſent time, no Eccleſiaſtical Juriſdiction is executed there, becauſe the Lord is dead; Yet Spiritual Juriſdiction is executed there. Hutton ſaid, If there be cauſe de bonis notabilibus, Then the Archbiſhop had the Prerogative, and might cauſe the proving of the Will. But it ſtood with reaſon, That where an Executor is tyed to perform the Will, which may be there ſued, and the property of ſute ought to be there, where there is cauſe of Prerogative. Harvey, If there be cauſe of Prerogative, and proof of the Will in the Prerogative Court. Yet in the inferiour Juriſdiction, the party will be compelled to prove the Will alſo. But by Crook and Hutton minus juſte.

An Action of Battery.

AN Action of Battery is brought againſt two, and one dies before tryall, and it was entred upon the Roll, But the Venire facias was awarded againſt both, and dammages aſſeſt. And by Yelverton, it cannot be amended. For it was not the Act of the Court, but of the Jury; So that now dammages cannot be ſevered. For although he may have the entire dammages againſt which he will, yet if they be ſeverd you will then ouſt him of his Election. Quod non fuit negatum.

Mich. 3. Car. rot. Banc.

A Prohibition.

IN a Motion for a Prohibition, where the Ordinary would make diſtribution, It was agreed (Richardſon being abſent) That if the Ordinary commits Adminiſtration to the Wife of the Inteſtate; that he cannot revoke that. But if he grant Adminiſtration to one as Prochein de Sank, and another more near of Blood comes; He may revoke. And becauſe the Adminiſtration being granted all the power of the Ordinary is determined, and then he cannot make diſtribution; And if the Adminiſtration be one time juſtly granted, the Grantee had a juſt Intereſt which cannot be revoked. And although it was urged that thoſe Prohibitions were not granted untill of late time; yet they ſay, thoſe things paſſed Sub ſilentio. Yelverton, They cannot grant Adminiſtration before a diviſion was made. And by Crook and Harvey. An Action upon the Caſe lyes againſt the Ordinary, if he will not grant Adminiſtration, where he ought. And at an other day it was moved by Finch Recorder, That ſuch a Prohibition could not iſſue in one Davyes Caſe. And Richardſon ſaid, That becauſe, that that Caſe was a Caſe of Extremity. For Davyes had not any thing or portion allotted him by his Father who was dead. And his Mother who was Adminiſtratrix, turned him out of her Houſe without any maintenance; ſtopped the Prohibition which was granted before. And ſaid that it was in the diſcretion of the Court to grant ſuch a Prohibition or not. But Harvey and Crook ſaid ſecretly betwæn themſelves, that it was not in the diſcretion of the Court.

Garton againſt Mellowes

AN action of Battery was brought by Garton againſt Mellowes. And the Plaintiff pleaded a Recovery by the ſame Plaintiff for the ſame Battery in the Kings Bench againſt another who joyned in the Battery. And the Plaintiff replies Nul tiel Record. Upon which they were at iſſue; and the Record was brought in at the day aſsigned. And theſe variances were objected for to make it fall of a Record.

And firſt, The award of the Diſt. jurat. in the Kings Bench is Coram domino Rege. and there it was Coram domino nuper rege. But not allowed. For the King died before the Plea there, and then it ought to be ſo pleaded.

Secondly, That in one Record the Plaintiff is Generoſus, in the other Armiger. Brampſton ſaid, That that was ſuch a variance which could not be amended. Dyer 173. One recovers in debt by the name of I. Cives and Sadler. And the Defendant brought Error, and removes the Record inter I. Civem & Salter, &c. And it was rul'd that the Record was not well removed upon that Writ. Dyer 178. Plo. 8. Upon Nul tiel Record there was a variance in the day of the Return of the Exigent, and in the place where the Outlary was pronounced; And adjudged a variance which could not be mended. And now where there cannot be an amendment becauſe it is after tryall. And by amendment, there might be a cauſe of changeing the Plea. For he took that Iſſue, by reaſon of the variance, and after verdict there cannot be an amendment, Mich. 2 Jac. Kings Bench, Tayler and Foſters Caſe. In an Ejectione firm. upon a Leaſe made 10 Iunii, and upon not guilty pleaded it was found for the Plaintiff. And in Error, it was aſsigned for error, that the Imparlance roll was 10 Iunii, and Iſſue roll the 12 Iunii: and it appeared there was a raſure. And it was agreed, that if it was after verdict it could not be amended. Atthowe, This variance is not ſubſtantiall. And the caſes

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put do not make to this caſe. For Salter and Sadler are two ſeverall Trades. And it cannot be intended the ſame man; for he may vary in his action as he pleaſes. But the Court ſaid nothing to that Exception. *Mich. 3 Car. Com. Banc.*

Thirdly, In the Record of Niſi prius there was another fault. It was agreed, that a Material variance cannot be amended. Yelverton ſaid, That he might have new Execution. For he pleaded a recovery and execution in Bar, and that they came to take, whereof he had failed; For that it ſtood now as another battery. For it does not appear by the Declaration of the Plaintiff, &c.

Smith againſt Sacheverill.

AN Action of Waſt is brought by Smith againſt Henry Sacheverill, and declares, Whereas Henry Sacheverill the Grandfather was ſeiſed of theſe Lands, he levyed a Fine of them, to the uſe of himſelf for life, with power to make a Leaſe for three lives, and after to Smith his ſon for his life, the remainder to the firſt begotten ſon of Smith in taple. The Grandfather makes a Leaſe for three lives, and dyes, and Smith and his firſt begotten ſon bring this Action of Waſt againſt the Leſſee; and they aſſigne their waſt in killing red Deer in a Park; and upon nul waſt pleaded, it was found for the Plaintiff; and Finch Recorder moved in arreſt of Judgement firſt, for that they aſſigne the waſt in a Park, where the waſt is in Land, &c.

Secondly, Becauſe that that Action did not lye for them both alike; for if the Grandfather, and he in the remainder in taple, had joyned in a Leaſe, yet they could not joyne in waſt. The Books are, If Tenant for life, and he in the remainder joyn in a Leaſe, they may alſo joyn in waſt. 21 H. 8 14. Although 19 H. 7. be put otherwiſe. And 2 H. 5. Sir William Langfords Caſe. Two joynt Tenants to the Heirs of one of them, and they make a Leaſe for life: And it was adjudged that they might joyn in waſt; for the Tenant for life had a reverſion for life, and had not made any Forfeiture. If the Grandfather and he in remainder had joyned in a Leaſe, and afterwards in waſt, it had been naught; for the leaſe came out of the firſt root. And it was reſolved Tr. 2 Jac. Kings Bench, Poole and Browſes Caſe, That one in remainder cannot have waſt, where there is an intermediate Eſtate for life. Yelverton and Hutton did not believe the Caſe of 2 Jac. Crook. If there be Tenant for life with ſuch a power, &c. of Lands held in capite, he may make Leaſes for life without Licence of Alienation, and well proves this cauſe, Yelverton and Hutton. For the waſt being aſſigned in a Park, it is good; for a Park is Land. Sed adjournatur.

Hodges againſt Franklin.

TRover and Converſion is brought by Hodges againſt Franklin. The Defendant pleads ſale of the Goods in Marlborough; which is a Market obert, and the Bar was well pleaded; and an Exception was taken; For that, that it is not ſaid that Toll was payed. It was ſaid by Hutton, That there are divers places where no Toll is to be paid upon ſale, in Market; And yet the Property is changed, and Judgement accordingly.

Grimſton againſt an Inn-keeper.

IN an Action upon the Caſe, it was ſaid at the Bar, and not gain-ſaped, That they ought to ſay in the Declaration, Traſiens hoſpitavit, for if he board or ſojourn for a certain ſpace in an Inne, and his Goods are ſtol-

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Mich. 3 Car. Com. Banc.

len, the Action upon that is not maintainable: And for omission, although the Verdict was given for the Plaintiff, Judgement was given Quod nihil capiat per billam, upon fault of the Declaration, and he paid no Costs.

Wilkins against Thomas.

Rol. 39 1 Bul. 16 1 Ro. ... 43 Cr. El. 201

IT was said by the whole Court, That a consideration is not traversable upon an Assumpsit, but they ought to plead the generall issue, and the Consideration ought to be given in Evidence.

Ireland against Higgins.

IReland brought an Action upon the Case against Higgins, for a Grey-hound, and counts that he was possessed ut de bonis suis propriis, and by Trover came to the Defendant; and in consideration thereof promised to re-deliver him. It seemed to Yelverton, that the Action would not lye, and the force of his Argument was, that a Grey-hound was de fera natura, in which there is no property, sed ratione fundi, like Deer and Coneys, and vouchd 3 H. 6. 56. 18 E. 4. 24. 10 H. 7. 19. for a Hawk; for Hares are but for pleasure, but Hawks are Merchandable. This difference in 12 H. 8. is allowed, so long as a Dogge is in the possession of a man, an Action of Trespasse lyes, detinue or replevin. But no Action if he was out of his possession, and so had not a property, then there is no consideration, which is the foundation of an Action. Hutton to the contrary, and said the whole argument consisted upon false grounds; as that a Dogge is feræ naturæ. Which if it were so, he agreed the difference in 12 H. 8. But he intended that a Dogge is not feræ naturæ; for at first all Beasts were feræ naturæ, but now by the industry of man they are corrected, and their savagenesse abated, and they are now domesticæ, and familiar with a man; as Horses, and a tame Deer, if it be taken, an Action lyes. Rogers of Norwich recovered Damages pro molosso suo interfecto. And 12 H. 8. So of a Hound called a Blood-hound. And a Dogge is for profit as well as for pleasure. For a Dogge preserves the substance of a man in killing the Vermine, as Foxes. And now is not an Horse for the pleasure of a man? for a man may goe on foot if he will, and an Horse is meat for a man no more than a Dogge. Therefore an Action may lye for the one, as for the other. And for a Hawk, he ought to shew that it was reclaimed. for they are intended feræ naturæ. One justifies in 24 Eliz. 30. for a Battery, because he would have taken away his Dogge from him. A Repleavin was brought for a Ferret and Nets, and a Ferret is more feræ nat. than a Dogge. Seale brought 25 Eliz. Trespass for taking away his Blood-hound; and there it was said to be well laid. And then now if he has a property, the consideration is good enough to ground an Assumpsit: It is adjudged that a feme dowable: The heir promises to endow her before such a day, and the Action is maintainable upon that by the Court. Intratur judic. pro quer. if no other matter were shewed by such a day.

Jenkins Case.

HE brought an Action upon a promise to the Plaintiff, That if he marryed her with the assent of her Father, she would give him 20 l. Adjudged a good consideration by the Court.

3 Car. rot. 414 Sir Edward Peito against Pemberton.

SIr Edward Peito is Plaintiff against Pemberton in a Replevin, and the Defendant was known as Bayliff to H. Peito, and said that H. Peito the Grandfather had granted a Rent for life to H. Peito the Son, to commence

mence after his death. The Plaintiff confeſſes the grant, but ſayes, that after the death of Peto the Grandfather, theſe Lands out of which the Rent iſſued, deſcended to Peto the father, who made a Leaſe for a thouſand years to the Grantee, and dyes. The Avowant confeſſes the Leaſe, but ſayes, that before the laſt day of payment, he ſurrendred to the Plaintiff. Upon which there was a Demurer, and the queſtion was whether the ſurrender of the Leaſe would revive the rent. Harvey, If he had aſſigned the Leaſe to a ſtranger, the rent had been ſuſpended. 5 H. 5. One grants a rent charge (who had a reverſion upon a Leaſe for life) to commence immediately; there the queſtion was, when the Leaſe was ſurrendred, whether the rent now became in eſſe, becauſe that the Leaſe, which privileged the Land from diſtreſſe, is now determined in the hands of the Grantor himſelf. Crook. If the Grantor had granted reverſion to a ſtranger, and the ſurrender had been to him; It was clear that the ſuſpenſion had been for the term. Hutton. If a man ſeiſed of a rent in Fee, takes a Leaſe of Lands, out of which, &c. for years, and dyes; the Executor ſhall have the Land, and yet the heir cannot have the rent. Harvey. In this Court it was the caſe of one Aſham, who had a purpoſe to encloſe a Common, and one Tenant was refractory, wherefore Aſham made him a Leaſe of the ſoil, in which he had Common, and afterwards he ſurrenders it again. And it was agreed that the Common was ſuſpended during the term. Crook. A Leaſe for years is by the contract of both parties, and the ſurrender may revive the rent; but by the ſurrender the arrearages ſhall not be revived. And ſuppoſe that the ſurrender was by Indenture, and a recitall of the grant, that is a grant; and then it is expreſſe, that by the ſurrender their intent was, that the rent ſhould be revived. 3 H. 6. A ſurrender determines the intereſt of all parties, but of a ſtranger. But it is determined to themſelves to all intents and purpoſes. Crook. It was one Cooks Caſe againſt Bullick, intrat. 45 Eliz. rot. 845. Com. ban. It was there adjudged, and this diverſity was taken, If one deviſe Lands in Fee, and after makes a Leaſe for years of the ſame Lands, to the Deviſee, to commence after his death, it is a countermand of his will; if the Leaſe was to commence preſently, it is no countermand; and the reaſon is, In the firſt caſe both cannot ſtand in Fee, the Deviſe and the Leaſe. But when the Leaſe commences immediately, he may outlive the Leaſe. And this Caſe is put upon the intents of the parties. But Henden, This Caſe is alſo adjudged, If two Tenants in Common are, and one grants a Rent charge, the Beaſts of the other are not diſtreinable. But if a Tenant in Common takes a Leaſe for years of another, his Cattel are diſcharged again. But Yelverton and Hutton doubted that Caſe, and ſo it was adjourned to be argued, &c.

Mich. 3 Car. Com. Banc.

Thomſons Caſe.

THompſon libells for delapidations againſt the Executors of his predeceſſor, and Henden moved for a Prohibition; for that that Thompſon is not incumbent, for his preſentment was by the King ratione minoritatis of one Chichley, and the King had not any ſuch Title to preſent; for where the King miſtakes his Title, his Preſentment is voyd, and he is no Incumbent. 6 Rep. 26. Greens Caſe. And Sir Thomas Gawdys Caſe, where the King preſented jure prærogat. when he had another Title; and the preſent Action was adjudged voyd, and whether he is incumbent or not, that ſhall be tryed. But by the Court a Prohibition was denyed, becauſe that he was now incumbent. And the Judges would not take notice of the ill Preſentment of the King. But in caſe of Symony the Statute makes the Church voyd, and then the Judges may take no-

Mich. 2. Car. Com. Banc.

tice of that, and grant a Prohibition, if the Parſon ſues for Tythes. But if a quare impedit be brought, and appears that the King had not cauſe of Preſentment, then a Prohibition may be granted: which alſo was granted by all the other Juſtices.

1 Jo 177
Hutt 92
1 Cr 86

Richard Youngs Caſe.

RIchard Young was Demandant in a Formedon, and admitted by Prochein amy, and the Warrant was allowed by a Judge, and it was certified and entred in Gulſtons Office in the Roll of Remembrance, but it was not entred in the Roll as the courſe in the Common Bench is, and after Judgement is given for the Plaintiff. And for that Formeden the Defendant brought a Writ of Errour, and removed the Record, and aſſigned it for Errour. And before in nullo eſt erratum pleaded. And Davenport moved that it might be mended, for he ſaid that there was a difference between that Court and the Kings Bench, as it is in the 4 Rep. 43. Rawlins Caſe; for the Entry of the Roll was Richard Young came et obtulit ſe per atturnat. ſuum, where it ſhould have been proximum amicum. And the Entry in the Remembrance Roll was, That he was admitted per Gardianum, Richardſon ſaid, that all the Books are, That an infant ought to ſue by Prochein amy, and defend by his Guardian, and ſo is a Demandant. But the Court agreed, That that ſhould be amended according to the Certificate. As a ſpeciall Verdict ſhould be amended, according to the Notes given to the Clerk. And Davenport ſaid that he would venture it, although it was by Guardian, for he held it all one, if it were by Guardian, or by Prochein Amy. See afterwards more of this.

The Vicar of Cheſhams Caſe.

THe Earl of Devonſhire had a Manor in the Parish of Cheſham, in Buckinghamſhire, which extended to Latmos, where there is a Chapell of Eaſe; and the Vicar of Cheſham Libells for Tithes, againſt one of the Tenants of the Manor. And Henden moved for a Prohibition, for that that the Earl preſcribed, that he and all his Tenants ſhould be acquitted of all the Tythes of Land within Latmos, paying 10. s. per. ann. to the Chaplin of Latmos. And he ſaid that ſuch a Preſcription is good, as it was adjudged in Bowles Caſe. And a Prohibition was granted.

Wildſhieres Caſe.

IT was agreed by the whole Court, That for Executing of a Capias utlagatum, or for a Warrant to Execute it, or for a return of it, no Fee is due to the Sheriff, &c.

It was afterwards agreed upon an Habeas corpus ſued by Wiltſhiere, who was impriſoned, being under-Sheriff, by the Lord Chamberlain, for arreſting Sir George Haſtings Servant to the King, upon a Cap. utlagat. That he may well doe it upon the Servant of the King: for it is the Suite of the King himſelf, and he is ſworn to ſerve it; and there is no cauſe of the Commitment returned, but only a recitall of the Commitment, unleſs he was releaſed by the Lord. And the Judges took exception to that, and ſaid that it ought to be, unleſs he can be releaſed by the Law; and ſaid, if no cauſe be returned, they ought to diſmiſſe the Priſoner: And they ordered the Keeper to informe the Lord Chamberlein; and that their Opinion was, and ſo was the Opinion of all the Judges of England, That he who procured the Commitment of the under Sheriff, ought to pay all the Charges and Expences, Quod nota. Went-

Mich. 3. Car. Cam. Banc.

Wentworth againſt Abraham.

THe Lord Wentworth brought an Action upon the Caſe, againſt Abraham, upon an Aſſumpſit, and declares that the Defendant 1 die Maii, Anno Dom. 1625. in conſideration that the Plaintiff would permit the Defendant to re-enter in a Meſſuage, and Croft, in which the Defendant had dwelt before, promiſed that he would pay to him 30. s. yearly, during the time that he ſhould enjoy it. And that he permiſit ipſum reentrare, and that he ſhould enjoy it a year and an half, which ended at Michaelmas, 1626. And for that he would not pay 45. s. he &c. And upon non Aſſumpſit pleaded, it was found for the Plaintiff. And it was moved by Davenport, in Arreſt of Judgement, for that that the Aſsize is to pay 30. s. Annuatim; then before the Action be determined, nothing is due, and the Plaintiff cannot divide the Rent, 5 R. 2. Annuity 21. Debitum Judex non leperat. Then when it does not appear that the Action lyes for the 15. s. for the half year, and the Jury aſſeſſed Damages intirely, it is void, as 10 Rep. 130. Osborns Caſe. And it appears that by his computation of time, it is not a year and an half from the time of the Aſſumpſit made. Richardſon ſaid, That it is not ſecundum ratum, for then he might divide the Rent; and no day is limited for the payment of it; for if a Leaſe be made for two years, or at will, paying annually at Michaelmas, 30. s. and the Leaſe is determined after half of the year; although that it be by the Leſſee himſelf, he cannot make any Rent. But Yelverton ſaid that that is not a Rent, but a collaterall ſum. And debt does not lye for that. And in the Declaration it is ſaid, Quod permiſit ipſum reentrare, and does not ſay what time, which was nought by all but Hutton. And it ought to be alſo that he did de facto re-enter. Hutton ſaid, There being it is ſaid, So long as you ſhall occupy the Land, you ſhall pay annually, &c. That he may demand half of the year. But the whole Court againſt him, and ſo Pro hoc tempore, judgement was ſtayed.

Grange and his Wife againſt Dixon.

A Leaſe was made by Baron and Feme, and another Feme, and the Leſſee Covenants by the ſame Indenture, to find ſufficient mans meat and horſe meat, to the Baron and Feme, and to the other Feme, or to their Servants at their coming to London, at his houſe in Southwark. The Baron and Feme dye, and the other Feme takes an husband. The Opinion of the Juſtices was, that he was not bound to find ſuſtenance for the husband, but only for the wife, or for her ſervants, and not for both at one and the ſame time, becauſe the Covenant was in the diſiunctive. But it was doubted if he ſhall find them victualls for one meal only at their coming, or for all the time of their ſtaying there.

Johnſon againſt Williams and Uxor.

IT was ſaid, If an Obligation be made by a Feme ſole, and afterwards ſhe takes an husband, and an Action of debt be brought upon that Obligation againſt the Baron and Feme, and they deny the Deed; the Baron ſhall be taken for the Fine as well as the wife, for the wife had nothing whereof to pay the Fine. And ſo in Treſpaſſe againſt Baron and Feme, dum ſola fuit, and they are both found guilty, both ſhall be taken for the Fine, which the Prothonotaryes agreed.

Mich. 3 Car. Com. Banc.

Jeakill againſt Linne.

IN a Writ of Covenant, the Plaintiff counts upon an Indenture of Leaſe of the Parſonage of Dale, by which the Defendant Covenanted to pay him the Rent, the which he had not payed. And the Defendant ſaid, that before any day of payment of the ſaid Rent incurred, one A. Ordinary of the ſame place ſequeſtred the ſaid Parſonage for non payment of the firſt fruits. Judgement. If an Action, &c. And by the Court, that is not a Plea; for he does not ſhew that any Act was done by the Plaintiff himſelf in his default. Nor he does not confeſſe and avoid the intereſt of the Leſſor, as to ſay that the Leſſor was a diſſeiſor, and made a Leaſe to him after that the diſſeiſee re-entred; and ſo he might confeſſe and avoid the Leaſe, notwithſtanding the Deed indented. But he cannot ſay that the Leſſor had nothing, at the time of the Leaſe made. And if the Defendant had been bound in an Obligation for the payment of the ſaid Rent, in debt brought upon that, that ſhould not have been a Plea; for he had bound himſelf to pay the ſaid Rent. And the occupation is not materiall where the Leaſe is for years or for life. But otherwiſe of a Leaſe at will.

Davies againſt Forteſcue.

IF a man (it was ſaid) be ſeiſed of a Manor, whereof there are divers Copy-holders admittable for life or for years; and he Leaſes the Manor to another for term of life, the Leſſor may make a Demiſe by Copy in reverſion, to commence after the death of the firſt Copy-holders, and that is good enough. But the cuſtome of ſome Manors is to the contrary, and that is allowed.

Doyly an Infants Caſe.

A Man ſeiſed of Lands makes a Feoffment in Fee by Deed indented, rendring a Rent, with a clauſe of Diſtreſſe, and afterwards he is bound in a Statute, and the day is incurred. Upon which an Execution is awarded to the Conuſee; and upon the Extent, the Sheriff returns that the party was dead, and that he had extended the ſaid Rent. And the heir of the Conuſor being within age (becauſe the Rent was extended during his nonage) brought an Audita querela, and Hutton ſaid, That it is maintainable enough, becauſe there is an Exception in the Writ of Extent, That if Land be deſcended to any Infant, that the Sheriff ſhall ſurceaſe to extend. And although that Writ iſſued againſt the party himſelf who made the Coniſance, yet when it appears by the return of the Sheriff, that he is dead, the Infant ſhall be aided by an Audita querela, or otherwiſe the Extent ſhall be void, which is made upon the poſſeſſion of the Infant.

Jeffryes Caſe.

IN a Formedon, the Plaintiff counts of a gift to his Father, and to his heirs of his body ingendred during the life of I. S. and makes the deſcent to him during the life of I. S. And Yelverton ſeemed that the Writ is good enough; for a Mayle may be made ſo determinable, as well as a Fee ſimple. And if a man Warrant Lands to the Feoffee, and his heirs, againſt him and his heirs during the life of I. S. That he had a Fee ſimple in the Warranty determinable upon the life of I. S. So here.

War-

Mich. 3 Car. Com. Banc.

Warberlyes Caſe.

IN a Writ De valore maritagii, it was moved by Henden, If the Lord ſhall recover his Damages according to the value of the Land held of him only, or according to all his Lands held alſo of others. And Hutton and Crook ſaid that the value of the Marriage ſhall be accounted, as well in reſpect of the lands held of him, as of other lands held of other Lords by Poſteriority, or in Soccage; for there the woman by the Marriage to him ſhall be more advanced. And the better the advancement is, the better is the Marriage of the heir, and the perſon more to be eſteemed.

Norbery againſt Watkins.

ONe Deviſes the Manor of S. to two and their heirs between them to be equally divided, ſo that they ſhall have part and portion alike. If by that they have a Joynt-tenancy, or a Tenancy in common was the Queſtion, becauſe there was an Act to be done for making the diviſion. And if the words had been equally to be divided by I. S. it had been clear that they had been Joynt-Tenants. But Harvey ſaid, That upon ſuch a gift made to them, if the one of them dyed before partition, yet their heirs ſhould hold ſeverally, according to the intent of the Will; for otherwiſe the Survivor ſhould hold place, which againſt the will of the Deviſor.

Northens Caſe.

A Man ſeiſed of a Manor, having all the Goods of Felons de ſe within the ſame Manor, and makes a Leaſe for years of parcell of the ſame Manor to a man, and afterwards makes another Leaſe of the ſame Lands to commence after the determination, ſurrender, or forfeiture of the firſt Leaſe. The firſt Leſſee was a Felo de ſe, the Lord Leſſor of the Manor enters into the lands Leaſed as forfeit, and the ſecond Leſſee ouſts him; and it ſeemed to Crook that the Entry was lawfull enough. Harvey ſaid, That the Leſſor to whom the Frank-Tenement belonged, entring into the land, the Frank-Tenement drowned the leſſer Eſtate; and the Leaſe for years is extinct in the Frank-Tenement. And it was ſaid, That therefore the firſt Leaſe extinguiſht. But if before that the Lord had alienedthe Manor ſaving to him the liberty, and after had entred for the Forfeiture, the ſecond Leſſee could not enter; for it is not any determination of the firſt Leaſe. Crook ſaid, That if the Leſſor infeoffed the firſt Leſſee of the Manor, that is a determination of the firſt Leaſe, and the ſecond Leſſee may enter.

The Biſhop of Wincheſter againſt Markham.

THomas Biſhop of Wincheſter, brought an Action upon the Statute of Weſt. 1 cap. 4. de ſcandalis magnatum, againſt Markham, for that he preferred a ſlanderous Bill againſt him before the Preſident of the Councel, ſurmiſing that he was a covetous and malicious Biſhop. And the Opinion of the Court was, That the words were ſufficient to maintain the Action.

A man ſeiſed of a Manor held in Chivalry, deviſes two parts of it to two men in ſeverality, and all the Remnant he deviſes to his heirs in Tayle, the remainder over in Fee. Hutton ſaid. It ſeems to me that the deviſe is voyd for the third part to the heir; for he might deviſe the two

Mich. 2. Car Com. Banc.

two parts by his Teſtament, and he had done all that he could doe by the Statute; and then the deviſe of the third part is out of the warranty of the Statute; for it is not reaſon that by the limitation of the third part (the which he could not doe) that the deviſe of the reſidue which was one time good, ſhall be defeated; which Harvey granted, but Crook to the contrary; for although the two parts were deviſed by the premiſſes of the Teſtament, and the third part in the end of it, yet in operation of Law the one part is not before the other, but the will is intire, and took effect in all its parts at one and the ſame time, by the death of the Deviſor. By which it ſeemed (for the benefit of him in the remainder) that he ſhall take the third part deviſed to him; for if a man ſeiſed of three Acres of land held in Chivalry, and deviſes them ſeverally to three ſeverall perſons in Fee, the heir ſhall have the third part of every of the three Acres, and not the Acre laſt deviſed, which Hutton granted. So alſo for the benefit of a third perſon, he ought to be judged in the third part as a Purchaſer, and not of an Eſtate by deſcent, and ſo is the better Opinion in 3 H. 6. But if he had deviſed the Tenements to his Son in Taile without limitation over of the remainder, there he might chooſe to be in of the Eſtate limited by the Deviſe, or as heir. Hutton. I doubt of that, for the Book is not agreed, 3 H. 6.

Wilkinſons Caſe.

The Baron ſeiſed of lands, makes a Feoffment upon condition to enfeoff him and his wife for life, the remainder over to a ſtranger in Fee. Atthow demanded if the Feoffee ſhall be bound to make the Feoffment before requeſt made by the Baron. Hutton and Crook thought that a requeſt ought to be made by the husband. And becauſe the particular Eſtate which is the foundation of the remainder limited to the ſtranger, ought to be made to the husband, who is party to the condition; and it is his will to take the Eſtate for life, or refuſe it, and the Feme is at his will. But if the Baron dyes, then it behooves him to make the Feoffment to the wife, without requeſt, becauſe ſhe is a ſtranger to the condition, by Act in Law. And ſo where ſhe dyes alſo before the Feoffment, the Eſtate ought to be made to him, to whom the remainder is limited, without any requeſt. Yelverton. But if the condition was to re-enfeoffe the Feoffor and a ſtranger, there it behoves the Feoffee to tender the Feoffment to the ſtranger, for he had not notice of the condition, and he ought to be party to all the Eſtate. And by the Livery made to him, the Feoffor ſhall take well enough.

Waterton againſt Loadman.

WAterton makes a Feoffee to the uſe of Loadman, in Fee to the uſe of another in Taple, the remainder to his right heirs in Fee. Ceſtui que uſe in Taple dyes, the firſt Feoffees enter, for to recontinue the uſe. Crook ſaid, That when Tenant in Taple in uſe makes a Feoffment, nothing paſſes but for his own life. For it had been agreed, where ceſtui que uſe pur vie, makes a Feoffment in Fee, (for it was not a Forfeiture of his Eſtate) becauſe nothing paſſed but for his life) then when the Feoffee dyes during the life of ceſtui que uſe in Taple, that cannot be any deſcent of the Fee, but as an Eſtate for life, the which determines by the death of ceſtui que uſe in Taple. And all the Juſtices were of the ſame Opinion; for the deſcent was, when he had not any Title of entry; for by the Feoffment he had a Title during the life of ceſtui que uſe in Taple. Wherefore during his life they could not enter, nor make continuall claim. But if the deſcent had been after the death of ceſtui que

uſe

uſe in Tayl, then otherwiſe it ſhall be; for they had a Title to enter before the deſcent, and by their laches they are told of that. Hutton ſeemed, That the Feoffees cannot enter in that caſe; for they cannot have the ſame Eſtate that they had before the alienation of ceſtui que uſe in Tayl; for by the Feoffment the Eſtate of the Fee ſimple which was to their right heirs, paſſes clearly; and it is lawfully in the Feoffee. Wherefore if they enter to re-continue the uſe in Tayl where they ſhall be ſeiſed of another Eſtate, where they ſhall be ſeiſed of a Fee ſimple alſo; and ſo there ſhall be two Eſtates of Fee ſimple of the ſame land, which is inconvenient. But the Juſtices ſaid, That ceſtui que uſe in Tayl, had no other remedy, unleſs by the Entry of the Feoffees. Mich. 3 Car. Com. Banc.

Harris againſt Marre.

A man ſeiſed of certain lands in Fee, makes a Feoffment in Fee to his uſe, and afterwards makes his will, by which he deviſes, That the Feoffees ſhall make an Eſtate of the ſame lands to all his Sons, except H. And if all his Sons dye without iſſue, that then the remainder ſhall be to an Eſtranger. Hutton ſaid, That becauſe H. was not excepted in the laſt clauſe, that he had an Eſtate Tayl.

The Maior and Commonalty of Winchesters Caſe.

The Biſhop of Wincheſter grants to the Maior and Commonalty of the ſame City, That they might Edifie in the vacant places of the ſame City, and inhabit there. And that Grant was confirmed by the Dean and Chapter; and the Opinion of Hutton was, That notwithſtanding that Grant, the ſoil is to the Biſhop, and by conſequence the Houſes. Quia quicquid plantatur ſolo cedit ſolo. And that grant does not enure, but as a Covenant or Licence, and not otherwiſe.

One Tomkins Caſe.

It was ſaid by the way, That if a man be in Execution for the Debt of another man, in the Fleet, the King cannot take him into his Protection, into his Wars, out of Priſon, untill the Debt be paid, becauſe that he is in Execution for the ſaid Debt; and the letting him out of Priſon, is to let him out of the Execution, which the Law will not ſuffer. But if he was in Execution in the Fleet, or other Priſon, for the Debt of the King, there he may diſcharge him, and take him into his Protection, or into his wars; for he may well diſcharge his own Debt.

Cur. Ca. 313
2 Ro. Abr. 451
2 Lut. 1360

Skore and Randalls Caſe.

The Caſe was thus. A Leaſe was made to Robert Chicheſter, for 99 years, to him, his Executors, Aſsigns, or Adminiſtrators, if Robert Chicheſter, or John Bellew, or James Bellew, or any of them ſhall ſo long live, yielding and paying therefore yearly and every year unto the ſaid Randall, his Heirs and Aſſigns, the ſum of 40. s. at the four moſt uſuall Feaſts, and alſo yielding at or upon the death of Chicheſter, Bellew or Bellew, his or their beſt Beaſt in the name of an Herriot, or 40. s. &c. Provided that if Bellew or Bellew dye in the life of Chicheſter, no Herriot to be paid after their deaths. A Diſtreſs is taken upon Skore the Aſsign of Chicheſter, for his own Beaſt. Aſhly. The Queſtion is whether his or their refer to Chicheſter, Bellew, or Bellew only, or may refer to Executors and Aſsigns of Chicheſter the Leſſee. And ſo whether the Beaſts of the Aſ-

ſignee

Mich. 3 Car. Com. Banc.

ſignée may be taken for an Herriot. And it ſeemed to him not, for that, that a Reſervation ought to be taken ſtrictly, 27 H. 8. Comment. 171. 21 H. 8. Dyer 45. So that if the words are words of Reſervation, or of Declaration which he will favour, they ſhall not be extended further than the words, &c. Bing. contrary, And he conceived that the Leſſee or his Executors before Aſsignment, ought to pay the Herriot, and afterwards the Aſsignee; for he who took the benefit, ought to ſuſtein the burthen. Sic tranſit res cum onere; and none took the benefit but the Aſsignee, or his Executors. And that is ſo ſtrange an intendment, that in the Habend. it is not named who ſhall yield or pay, but it is intended he who had the land; and that Herriot comes in to the render of the Rent, and render does ſuppoſe a Prender. And it is coupled with the reſervation of Rent, and it may be granted that the Tenant ſhall pay the Rent. And then it immediately followes, And alſo his or their beſt, &c. which then ought to be the Beaſt of him in poſſeſſion.

Secondly, The other Expoſition ſhould be impoſsible to be performed; for none ſhall be charged but thoſe that are either privy in contract or Eſtate; and the Executors of Chicheſter are not privy to any, and Bellewes are the perſons only named by the limitation of the Eſtate, and not any wayes privy. It may be ſaid, that the Tenant ſhall pay the Beaſt of Chicheſter, and ſo his Beaſt. But no man may give the Beaſt of another. And if it be ſaid, That he may buy him, then the Property ſhould be altered, and it would be his own Beaſt. Yielding his or their Beaſt, It cannot be intended, that Bellew or Bellew, might yield; but the Leaſe is granted to him, his Executors or Aſsigns, then his or their Leſſee, or their Executors or Aſsigns. And you cannot have a forraign intendment of Bellew or Bellew. Then the Expoſition is good, that the Herriot ought to goe with the Eſtate. Hutton. That Reſervation is not of a thing that agrees with the Rent, but it is of a collaterall matter, and it is of a thing againſt common right; and for that it ought to be taken ſtrictly, and to be the Beaſt of him that dyed; for if it had been, Yielding the beſt Beaſt of a ſtranger, it had been good; but there is Election of the Herriot, or of 40. s. Then by Aſsignment one part is become impoſsible; for the Aſsignee cannot pay the Beaſt of Chicheſter, but the Fourty ſhillings he may pay. And becauſe the Diſtreſs may be taken for the 40. s. therefore the Avowry is naught Richardſon. If Chicheſter dye Tenant, then his Beaſt ſhall be paid. And his Executors, if the intereſt come to them, ſhall cauſe that it be paid; for Chicheſter made the Contract, and that goes to his Executors, but not to the Aſsigns. And for the 40. s. that is demandable againſt the Executors of Chicheſter. Yelverton. The caſe is doubtful, but I incline, that the Avowry is not good; for the words in the Reſervation of the Heriot are ſpeciall. If it had been ſaid, And alſo yielding after his and their death, his or their beſt Beaſt. There it would be the Beaſt of the Leſſee, his Executors or Aſsigns. But alſo he had ſever'd it from the Rent, and had taken out of the courſe of the Eſtate; for otherwiſe it concurred and went with the Rent; But alſo he had made it collaterall; for it is to be paid after the death of the ſtranger. For his or their cannot be carried but to the perſons named by the limitation. And the Proviſo explains that, that it ſhould not be payed after the death of the Aſsignee. But if it had been rendring the beſt Beaſt after the death of the ſtranger, It ſhould be payed by him that had the Inheritance. But he held for the 40. s. that the Executors ſhall not pay it.

Perry.

Mich. 3 Car. Com. Banc.

Perryman againſt Bowden.

PErryman brought a Replevin againſt Bowden and Brown, who made a Recogniſance in the name of Bedle. And the Caſe was thus. A rent is granted payable at Michaelmas and the Annunciation; And if it be in arrear by 40 daies after any day of payment, upon the demand at ſuch a place, he might diſtrain. And it is not ſhewed that he demanded it; And for that a demurrer. Attbowe, it is not requiſite to ſhew a demand, for the diſtreſs it ſelf is a demand. And it was adjudged in this Court; If a Rent be granted, and that he may without demand diſtreyn; and good without demand. And the words (if it be demanded) are material; Becauſe it is demandable in a Collateral place, out of the Land charged. Crook, Grant of a rent, and that I pay it at Michaelmas all waies, if it be demanded at my Houſe; there ought to be a demand. And ſuppoſe it was to be demanded in ſuch a place, upon the Land; I conceive the demand ought to be made accordingly. Yelverton, A Leaſe was made rendring a rent payable at ſuch a day: upon Condition that if the rent be not paid at ſuch a day without demand, That the Leſſor may reenter. And adjudged that no demand is now requiſite. For modus et conventio vincunt legem, &c. Sed adjurnatur.

Wolfes Caſe before.

THe Plaintiff was an Attorney who ſued by attachment of Privilege; And now the Court would not permit the amendment; Becauſe there was a material Error, for it is to the diſadvantage of the King. For if the party be non-ſuite, or a verdict paſſes againſt him, the King ſhall have a Fine for falſe clamour, and may recover them againſt the pledges. But now where it is the Act of the Court or of the Clark or Attorny, and not the party himſelf, there may be amendment. As warrant of Attorney may be entred after the Record removed. And although that pledges were entred upon the Iſſue roll, where it ought to have been upon the Imparlance roll But not on the contrary. For the Iſſue roll is the inferiour. Harvey, If a Suite be by Bill, as an Attorney being Defendant, there are alwaies pledges entred in the Bill. But if by Attachment alſo as ſo, Then the Declaration is the Original. Crook 12 Eliz. Dyer. There Judgement was reverſed for want of Pledges. And although that Caſe was before the Statute of 8 Eliz. yet that Statute does not ayd ſubſtantial Errors. And in one Huſſeys Caſe in the Kings Bench, That was adjudged for Error.

Hob. 76
2 Cr. 89. 105

Wilkinſons Caſe.

CRew moved, that two were bound in a Statute, and one dies, his Heir within age. That the extent ſhall demur; Becauſe that uſura recurrit contra hæredem infra ætatem exiſtentem And he cited 17 Aſſ. 24. by Mawbrey. And ſo it was agreed by the Court. And Richardſon ſaid, That in that reſpect, the Statute is an ill aſſurance. Quod nota.

Waddingtons Caſe.

AYliff moved for a Prohibition for one Waddington, for that, that he was executor, and was ſued in the Councell of York, upon an Obligation for the payment of a Legacy. And he alleges that a Leaſe which was put in the Inventory, was alienated to him by the Teſtator in

Mich. 3 Car. Com. Banc.

his life time. And ſo the Queſtion will be whether that ſhould be Aſſets, which ought to be tryed at the Common law. And therefore prayed a Prohibition. Richardſon ſaid, The Councel of York have power of all Obligations; And therefore having Juriſdiction of the principal, they have Juriſdiction of the accellary. Davenport, It is ſeen that they may proceed upon an Obligation of all ſums; If they proceed Suo genere, as in the Court of Equity. But if a thing tryable at Common law, as Aſſets or not Aſſets come; they cannot proceed, &c. Richardſon, If a Suit be there for a Legacy, and payment be pleaded; they may try that. But if they meddle in matter of Title, then a Prohibition ſhall be granted. Hutton, There hath been many motions upon theſe Eccleſiaſtical Obligations for Prohibitions; and allwaies they were denied. And ſo it was inthis Caſe.

Comins Caſe.

IN one Comins Caſe, it was agreed by the Court, That a Subject may have a Foreſt, But cannot have a Juſtice Seat. But he may have a Swanmark Court, and the other Courts, and a Commiſsion to execute them. Then a Foreſt in the hands of a Subject ſhall pay Tithes. And it was agreed that in the hands of the King it is privileged. And by Henden, Davenport, and Atthowe Sergeants, It is only his perſonall privilege, which extends to the Leſſee of the King; But not to the Feoffee. And it was agreed, That where the right of tithes comes in Queſtion between a Parſon and the Vicar, who are both Eccleſiaſtical perſons. It ſhall be tryed by the Eccleſiaſtical Court. But Richardſon ſaid the Books make a doubt; Where it is between the Servant of the Vicar, and the Parſon. But it ſeemed to him to be all one.

Margery Rivets Caſe before.

RIchardſon, Hutton, and Harvey ſaid, That the Devaſtavit ought to be to Margery for Neceſsity ſake, For it cannot be intended otherwiſe. For none can ſatisfie the Debt but Margery. And the intention of the Replication was to charge her de bonis prop. for waſte: and no other can be intended to waſte. And the Caſe put of I. S. ſo being ſeiſed, feoffavit; There it is good without præſict. I. S. But for the thing it ought to be Feoffavit inde, 21 H. 7. There if W. S. be named again, It ſhall be intended the ſame W. S. if there be not quidam I. S. and then otherwiſe: and alſo it is much mended by the Replication. For there it is ipſa Margareta non devaſtavit. But Crook and Yelverton on the contrary, according to their reaſons before; that no Iſſue is joyned; And then the Statute does not apply it; For there is not any Nominative Caſe to which it may referre. If it had been quo die Margery habens bona devaſtavit, had been good. But being bona habuit, no Grammarian can make Conſtruction of it. And the Replication or Declaration ought to be certain to all intents, 27 H. 6. 3. Wroteſleys Caſe, In an information of Tithes, It was ſaid, That the Defendant cognoſcens him to be in ſute: being ruled, that Congnoſcens is not poſitively an affirmation, but it ought to be cognovit; And Judgement was had upon it; and yet after for that fault reverſed. 1 R. 3. There the Caſe was; After verdict was entred that the Jury appeared, et electi & triati dicunt ſuper ſacramentum ſuum. There it was reverſed, becauſe it was not Iurati, and yet that was implyed by ſacramentum ſtrongly. But Implications ought not to be allowed in Replications; then we

ſhould

ſhould introduce ſo many incertainties. But by Crook Judgement ſhall be given againſt the Plaintiff upon his own Replication. For that, that the waſte is ſuppoſed after the Son came at full age; and then the Adminiſtration that determines. And Judgement was given for the Defendant. *Mich. 3 Car. Com. Banc.*

Roberts and others.

ROberts and others in Eaſt Greenwich, were cited in the Spiritual Court to pay mony that the Wardens had expended in reparation of the Church. And the Inhabitants alleged, That the tax was made by the Church-wardens themſelves, without calling the Free-holders, and alſo that the monys were expended in the re-edifying of Seats which belonged to their ſeveral Houſes: And they never aſſented that they ſhould be pulled down. And now that allegation was not allowed, but ſentence was given againſt them. And then they appealed to the Arches, where this allegation was alſo rejected; And for that he prayed a Prohibition; And the Court agreed, That the tax cannot be made by the Church-wardens; But by the greater number of the Inhabitants it may, and a Prohibition was granted. But by Yelverton, If it be cited by ex Officio, a Prohibition will not lye. For ſo it was ex inſinuatione, &c. For the Wardens came and prayed a Citation, &c. But by Richardſon, Harvey, and Crook privately, a Prohibition will lye in both Caſes.

Commin againſt Carre.

COmmin brought Treſpaſs againſt Carre for taking of two Heifers. The Defendant pleads, that the King was ſeiſed of a Wapentake in Yorkſhire; And had ſo large Juriſdiction as another Turn of the Sheriff. And then he ſaid, that the Plaintiff plaid at Cards within that Wapentake, in the Houſe of ſuch an one; and ſaid that that is contra formam Statuti, 33 H. 8. ca. 9. And ſaid then, that he plaid at Cards another day. And thirdly, that he broke a Pin-fold, &c. And that the 24 Martii, 21 Iac. warning was given to the Plaintiff, he being an Inhabitant, for a year before, within the Juriſdiction of that Court, that he ought to appear the laſt day of March following; And ſaid that the Court was then held, and thoſe offences were preſented, and that for his not appearing he was amerced 12 d. and for the playing 6 s. 8 d. and for the breaking the pound 3 s. 4 d. And now for all thoſe amerciaments he diſtrained, by vertue of a Warrant of the Steward of the Court (and does not ſay what warrant) And then juſtifies the ſelling of the ſaid Heifers for 20 s. and that he retained 17 s. and offered the ſurpluſage to the Plaintiff. Arthow, there is not any thing to prove any forfeiture by the Plaintiff. For the Statute is upon two branches.

Firſt, That no Common houſe of play be kept.

Secondly, If any uſe thoſe Houſes, and play, &c. That it is not ſaid that that is a Common houſe of play. But then it will be ſaid, that it is alleged contra formam Statuti; and that will imply that. But now that is not ſufficient; For if any inform contra formam Statuti, If by his own ſhewing it does not appear contra formam Statuti, He ſhall not have Judgement. Richardſon, A Common houſe of play, is a Houſe for lucre, maintained for play; And there the Law makes a difference between Common perſons and private, &c. But contra formam Statuti will not ſerve. For the offence ought to be alleged fully. Yelverton made four cauſes of Diſtreſs, ſelling the Diſtreſs: If it be good for any it is ſufficient. And if there be a Juſtification for three cauſes in Avowry; If it be good by any, It is ſufficient. 9 H 6. But ſo it is where a

Mich. 3. Ca. Com. Banc.

treſpaſs, &c. Harvey, A Juſtification in a Leet; That he diſtreyn'd and ſold, and delivered the overplus to the party, in the Caſe of the King it is good, But in the Caſe of Common perſons I doubt whether he may ſell; And in the Caſe of the King he ought to deteyn the diſtreſs for 16 daies before ſale. But by Yelverton and Hutton, All Leets are the Courts of the King; and they may be uſed as the Courts of the King. And it was ſaid afterwards by Richardſon, That the Statute was groſly miſtaken. And that divers amerciaments were wanting. And ſo Judgment for the Plaintiff.

Traver againſt the Lord Bridgewater et Ux.

TRavers brought an action upon the Caſe againſt the Lord Bridgewaters and his Wife, Adminiſtratrix of T. D. her Husband deceaſed. For that the ſaid T. D. in conſideration that the ſaid Travers, tradidiſſet & deliberaſſet to the ſaid T. D. divers Merchandizes, he promiſed to pay, &c. The Defendant pleads that the ſaid T. D. non aſſumpſit. And 'twas found for the Plaintiff, and pleaded in Arreſt of Judgement, that it was no Conſideration. And adjudged for the Defendant. For when he ſaid tradidiſſet & deliberaſſet, That they might be his own Goods. Otherwiſe if he had ſaid vendidiſſet de novo, E. 4. 19. Accordingly.

Palmers Caſe.

IT was held by the Court, If a man aſſume to pay mony due, in conſideration to forbear to ſue him paululum temporis. And if he forbear for a convenient time; It is a ſufficient conſideration, upon which to ground an Aſſumpſit The caſe was between Palmer and Rouſe P. 40 El. rot. 537. The Plaintiff counts that I. S. was indebted to him upon an Obligation, and he forfeited it and dies, and made the Defendant his Executor. And that the Plaintiff was forced to ſue the Obligation, and in conſideration of the premiſes. The Defendant aſſumed that if the Plaintiff would forbear him pro brevi tempore that he would pay him. And the Paintiff fidem adhibens, &c. forbore 4 years to ſue him; and ſaid that the Defendant had Aſſets. The Defendant ſaid abſque hoc that he had Aſſets. And upon that the Plaintiff demurred; and adjudged for him. For the alleging of Aſſets in the Count is ſurpluſage. And now the conſideration was ſufficient, for he had counted he had forbore for four years.

Panton againſt Haſſel.

PAnton brought an action upon the Caſe of trover and converſion againſt Haſſell, who declared, That whereas he was poſſeſſed of certain Jewels 16 April he loſt them, and 20 Jan. they came to the hands of the Defendant, and he converted them. And this was ſuppoſed to be done in Huntingtonſhire; The Defendant pleads, that time out of mind, &c. the City of Briſtow is and hath been a Market overt, in Shops et locis apertis, and the Defendant bought them in his Shop. And further ſhews that he is a Gold-Smith, by reaſon of which he was poſſeſſed of them as his proper Goods, and converted them to his own uſe, which is the ſame converſion. Hutton, When the Defendant had ſuppoſed an abſolute property by the ſale in the Market overt, that Converſion after, cannot be a Converſion of the Goods of the Plaintiff For of neceſsity there ought to be a mean time between the change of the property, and the

the converſion. Alſo the Cuſtome is naught; for he ought to ſay in locis apertis & ſhops apertis; For the cauſe of the change of the property is, Becauſe every one may come thereto and ſee if they are his Goods, and there challenge them. So that by ſome intendment in this preſcription, that Shop might be a private Shop. And although that it be averred in facto that that Shop is apert; Yet when the preſcription is miſlayed, the Bar is naught. For if Iſſue be taken que fuit ſhop apert: That is not a good iſſue. Mich. 3 Car. Com. Banc.

Alſo he preſcribed, that there was a Market overt every day, except Sunday and Feſtivals; and that it was not Sunday or Feſtival, where it ſhould have been nec Feſtival per que, &c. Harvey ſaid, That word apertis ſhall have relation as well to ſhops as to locis; Hutton at Newgate Seſſions ſeven of the Juſtices being preſent, there was a Queſtion, That if a man having Cloath ſtollen from him, and that was ſold in a Scriveners Shop, Reſolved that there was no change of the property. For by intendment (if a man had Drapery ſtollen from him) he would not ſeek it there. So if a man ſells ſtollen Plate, and ſells it in the High ſtreet under his Cloak, It does not change property. And if a man ſells a thing in a Silkmans Shop in London (the Curtain being drawn) That does not change the property. And now to the principal Caſe, Although he ſaid that he was a Goldſmith and that that was his Shop, It is not neceſſary to be intended, that he uſed the Trade of a Goldſmith in it; And that ought to be averred. For every Shop is a Market overt: for theſe Cauſes only, which appertain to the ſame trade.

Williams againſt Bickerton.

WIlliams brought an action upon the Caſe againſt Bickerton for ſaying, He hath forſworn himſelf, and ile teach him the price of an Oath, for I will have his Ears crop. And it ſeemed that it lay. For although it was not ſaid at the beginning, where it was that he forſwore himſelf, Yet by the circumſtance it ſhews that he was in ſuch a place, for which it was puniſhable. And M. 29, 30 Eliz. Dantſleys Caſe. Thou art a Pillary Knave, remember that thou haſt deſerved the Pillary; and the Action maintainable. And the Plaintiff paid the Box for his Judgement.

Bradyes againſt Johnſon.

BRadye brought an Eject. firm. againſt Johnſon, and declared upon a Leaſe of Land habend. a die dat. Indentur. prædict. And does not ſpeak of any Indenture before. And for that the Declaration adjudged naught. And ſo it was between Bell and March. And this ſame term between Spark, Where it was ſhewed quod conceſſit per eandem Indent. Where he had not ſpoke of any Indenture before.

Lowen againſt Cocks.

IN Debt by Lowen againſt Cocks, the Caſe was thus, A man ſeiſed of an houſe in St. Edmonds Parish in Lumbard-ſtreet in London, deviſes it to his wife for life, the remainder to his Son George, and if he dye without Iſſue, then to John and Thomas his Sons equally, and to their Heirs. The wife dyes, George dyes without Iſſue, J. and T. make a Leaſe for years, rendring 5. l. to the one, and 5. l. to the other, J. deviſes the reverſion to his wife, and dyes, and for that Rent the Action was brought by the

Mich. 3 Car. Com. Banc.

the Wife. And the Queſtion was, if they ſhall be Joynt or Tenants in Common. (For if joynt the deviſe of the Reverſion is void.) And Secondly, If by any Act which makes partition (viz.) the ſeveral Limitations of the rent to them. It ſeemed to Hutton that they are Tenents in Common; By reaſon of that word equally, which in it ſelf makes a Diviſion. In 33 Eliz. in Boucher againſt Marſh. It was held, that where a man deviſes Lands to three Children equally to be divided; they are Tenents in Common. And ſo it was 14 Iac. in caſe of Goods. And it is clear (as it is ſaid) If a Man deviſe 100 l. to two equally, the Executors ſhall pay 50 l. to the one, and 50 l. to the other. For if that word equally does not make tenancy in Common, it ſhall be all otherwiſe void. And every word of a Will ought to be of ſome force. And in theſe Caſes the word divided was not the force of the matter, but only equally, And it was the Caſe of a Shepheard in the Courts of Wards. Where a man deviſes, that after the death of his Son all my woods ſhall remain equally to his Daughters and their Heirs of their bodies. And it was there held by Dyer and Manwood that they were Tenents in Common. If Parceners agree to hold by, That is ſufficient partition. And if the one Joyntenant confirms to the other, that does not give any thing, but ſevers the Joynture. Harvey to the contrary.

2 Yo 130 162
3 Ch 238

Firſt, They are Joint, For Joynture is the greateſt equality, for every one is ſeiſed by himſelf, and the one hath as much of the profits as the other. And ſo equal intereſt and equal benefit to the Survivor. 6 E. 6. in Dyer. A difference was taken between a Demiſe to two, when it is ſaid equally divided. That they ſhall be Tenents in Common; If equally to be divided they ſhall be joynt. But it was never adjudged. 17 Eliz. A man having 3 Sons, deviſes Lands to them equally to be divided. The Queſtion was what eſtate they had. For if the younger had not a fee, they could not have an Eſtate equal with the eldeſt, for he had a fee. Reſolved, that they ſhall have a fee-ſimple: and alſo that they ſhall be Tenents in Common. And held that to be divided and divided was all one. And it was held alſo that the word divided makes the Tenancy in Common, and not equally. 2. As to that reſerve of 50 l. to the one, and 50 l. to the other, clearly being a joynt Leaſe, and a joynt reverſion. And the Rent as acceſſary to the reverſion, and ſhall not change the nature of it. Yelverton, They are Tenents in Common. A Will ſhall be conſtrued according to the intent of the Teſtator. And expoſition ſhall be made of the words to ſupply his intent.

Tomlins's Caſe.

IT was agreed by all, That if one ſojourn in the Houſe of another; and the Houſe is broken in the night, and the Stranger robbed in the Houſe, without being put in fear of his life, In law. He that robbed ſhall have his Clergy, notwithſtanding the Burglary. For it is out of the Statute of 5 & 6 of E. 6. cap. 9.

Dickſons Caſe.

AT Sergeants Inne in Chancery lane this Queſtion was debated, If a man ſteal Goods, and the very Owner makes freſh ſute to take the felon; So that he waives the Goods and flies; And before the Owner comes, the Goods are ſeiſed as Goods waived, and after the Owner comes and challenges them. Now if he ſhall have them, or they ſhall be forfeited was the Queſtion. And it was held by Harvey and Crook, That they are not at all forfeited; for that the Owner had

2 Roll. 193

done

done his endeavour and purſued from village. And that the Goods ſhall not be ſaid to be waived, but where it cannot be known to whom the property is. Hutton Chief Juſtice, and Yellerton ſaid. That Goods waived ſhall be ſaid thoſe which are ſtollen, and that the Felon being purſued, for danger of apprehenſion waives and flies. Now if they are ſeiſed before that the Owner comes, the property is preſently altered out of the Owner in the Lord, although that he made freſh ſute, If that Sute was not within the view of the Felon allwaies. But they all agreed, if the Felon does not flye, but is apprehended with the Goods, That then the Owner ſhall have his Goods without Queſtion. Or if the Owner comes and challenges the Goods before ſeiſure; and after the flight of the Felon. Harvey ſaid, The Statute of 21 H. 8. cap. 13. does not remedy any thing, as to the reſtitution of the Goods ſtollen. But upon the evidence of the party, or by others by his procurement in the ſame manner. As it was in an appeal upon a freſh ſute at the Common-law.

Mich. 3 Car. apu. Rott.

Mo 872. 2 Leon 195. Ro: 809

It was ſaid by all, That although the cuſtome was of Burgage lands in ſoccage; Yet if the Lands came by gift or otherwiſe to tenure in Chief, or ſervice of Chivalry, That that now changes not the Cuſtome, which allwaies goes with the Land, and not with the tenure: As the Lands in Gavelkind, by the Cuſtome are ſoccage tenure; Yet if they are changed to ſervice of Chivalry, the Cuſtome is not altered, But that all the heirs ſhall inherit.

It was agreed by all, That if ſix perſons compaſs and imagine to levy war againſt the King; And there is an agreement between them, that two ſhall do ſuch an act in ſuch a County, and the other two another act in ſuch a County. And ſo divers acts by divers in ſeveral Counties for to aſſemble the people againſt the King. And after two do the Act according to their purpoſe, and aſſemble the people, and the other do nothing. Yet the Act done by two upon the agreement, is Treaſon in all. But otherwiſe it is if there had been only a compaſsing, &c. and not any agreement, and afterwards one of them does the act unknowing to the others; there it is not Treaſon, but in thoſe that doe the fact, and not in the others. As it happened in the Caſe between the King and an other.

Wilkins againſt Thomas.

IT was adjudged upon good adviſe; That if an Infant be impleaded by any precipe of his Lands; And loſes by defending. Now he ſhall have a Writ of Error. And becauſe that he was within age at the time of the Judgement, it ſhall be reverſed. And the Infant ſhall be reſtored to all that he loſt. As it happened in the Caſe of John Ware againſt Anderſon and others in the County of York, loſt while they were infra ætatem. Where it appeared that they appeared by their Guardian (admitted to them by the Court) to the Grand cape; and that they were within age. But there was an inſpection by Nurſes and Friends, and they were found not to be within age.

Hill. 3. Car. Com. Banc.

John Symons againſt Thomas Symons.

NOte it was ſaid by all the Juſtices; That if the Diſſeiſee enter upon the Feoffee or Leſſee of the Diſſeiſor, That he ſhall not have an Action of the Treſpaſs for the ſame Treſpaſs againſt the Feoffee or Leſſee; Becauſe that they come in by a Title. And at Common law before the Statute of Gloc. No dammages for mean occupation againſt the Feoffee or Leſſee.

Bromleys Caſe.

IF a man ſteal goods, and be arraigned upon an Indictment of felony, and the goods are valued to 6 s. and the Jury upon their verdict ſay, That he is guilty of the ſaid goods, but that the value was but 6 d. That is a good verdict; And the Juſtices ſhall puniſh him as for petty Larceny. In the ſame manner it is, If a man be arraigned for willfull murther, and the Jury find it but Manſlaughter. That is a good verdict by all the Juſtices.

Peaſe againſt Thompſon.

A Man ſeiſed of Lands in fee makes a feoffment from that day, to divers, to the uſe of his Wife for her life, and after to the uſe of the heirs of the body of the Feoffor. The Feme dies, and the Feoffor makes a Leaſe for years and dies. Now her Iſſue ſhall not avoid that Leaſe, becauſe a man cannot have Heirs in his life: So that at the time of the death of the Feme there was none to take by the remainder. And for that the Feoffor had the fee; the Leaſe is good and ſhall bind the Heir. As if a Leaſe be made for life, the Remainder to the right Heirs of I. S. and I. S. dies in the life of the Leſſee: then the remainder is good, otherwiſe not, but it ſhall revert. But otherwiſe it ſhall be peradventure in ſuch a Caſe as a demiſe.

Hillary 3 Car. Com. Banc.

Skore againſt Randall.

SKore brought Debt againſt Randall, and recovered, and had execution by Elegit, and it was found by the Inquiſition that the Defendant was ſeiſed of the moyety of a Paſſuage and Lands for life, and other Lands in right of his Wife. And the Sheriff returns that virtute brevis, et deliberat. feci meditatem omnium præmiſſorum cum pertinentiis, &c. Nec non duo pomaria, nec non unum clauſum vocat. &c. And that he had delivered the moyety of the Lands in right of his Wife, and his Chattells, and recites them, and that Elegit was filed. And the Queſtion was, whether he might have a new Elegit, Becauſe that the Sheriff ought to have delivered to him the moyety of the moyetie of the Lands held in Joint-tenancy. So that the Tenent by Elegit might be Tenant in Common for a fourth part with the Joynt tenants, as it was agreed. But alſo by that Delivery he had but in effect the eighth part; For the other Joynt-tenants, may occupy the Land delivered with him in Common. Richardſon ſaid, For part of the Lands and goods, in right of his Wife, the return is good; And being filed he cannot have a new Election. For if part ſhall be evicted, you cannot have a new Extent upon

on the Eſtate. But if it had been in the Genitive Caſe Duorum pomorariorum, &c. it had been good. But it was granted by the Court, That the Plaintiff makes a ſurmiſe, that the Sheriff male ſe geſſit in the Execution of that Elegit, and then he may have a new Elegit at his peril, &c. *Hil. 3. Car. Com. Banc.*

Edward Thomas againſt John Morgan, et al.

EDward Thomas brought an Ejectione firmæ againſt Morgan, Kemmis, and others, and upon Not guilty pleaded, a ſpeciall Verdict was given to this effect, for Morgan and Kemmis, (for the other ſome were dead before iſſue, and the other not guilty) and they found a Judgement dated 12 Sept. 33 Eliz. and deliver'd the 15 Iunii next enſuing. Which was between the then Biſhop of St. Davids of the one part, and Richard Thomas of the other part. And it was in conſideration of a Marriage to be had between him and the Daughter of the Biſhop, That before the end of Hillary Term next enſuing, he would levy a Fine of all thoſe Lands, and all the other lands in Mounmouth, and that ſhould be to Thomas Morgan, and Roger Siſe of Lincoln-Inne. And that he ſuffered a recovery with double voucher to the uſes in the Indenture, But the words are, that the Comiſſees ſhould ſtand ſeiſed to the uſe. And by Atthowe, the Recovery is idle, for the uſes ſhall be executed, and then there ſhall be no Tenant to the Precipe, (viz.) That of all the Lands mentioned in the Indenture Morgain and Siſe ſhall ſtand ſeiſed to the only uſes hereafter, &c. that is to ſay, They ſhall be ſeiſed of in part of the Lands and Tenements, that is ſo much thereof as ſhall amount to the clear value of 30 l. by the year, to the uſe of Richard, and Anne Daughter of the Biſhop, after mariage, for their lives. Which Lands and Tenements to the value of 30 l. per annum ſhall be appointed and limitted out by meets and bounds, and put in writing before Hillary Term next, and delivered to the uſe of Edward Thomas, and Walter Thomas for their lives, which were Uncles of Richard, if Richard and Anne had Iſſue male. When the Survivor of them dyes without Iſſue male, or if all the Iſſue male dye without Iſſue male; Then the uſe to Edward and Thomas to ceaſe. Alſo there be two Conditions, the one Precedent, the other Subſequent; And the precedent Condition makes that a contingent Remainder. But Atthow would have that ſettled without Iſſue born to Richard, &c. But if all their Iſſues dye before the Survivor; It can never be ſetled. For the words (ſcil.) at the death of the Survivor, &c. And then before the contingency happen, it cannot be ſetled. If the contingency had been void at the time of the limitations; I agree it ſhould be void. Now if the particular Eſtate be contingent; all that depends upon it is contingent alſo. And Edward and Walter took nothing but after the death of the Survivor of Richard and Anne without Iſſue. And then it is as in the Caſe of Cook 10. 85. A Feoffment to the uſe of A. for life, and after the death of B. to the uſe of C. and his Heirs. That Remainder is contingent, Becauſe that B. ought to dye in the life of A. or the Remainder ſhall never veſt. So alſo to Richard and Anne for their lives, and after their deaths without Iſſue to Edward and Walter. And if they ever take an Eſtate, it ought to be after their deaths, &c.

Secondly, For the uſes of the Reſidue. To the uſe of Richard for life, and if he dye living A. without Iſſue male ingendred of the body of A. Then to A. for life, that is contingent, then of the reſidue, after the death of Richard to the uſe of Edward & Walter, if Richard had not iſſue of Anne at the time of his death. Whether it veſts after his death ſee before, &c. That

Hil. 3 Car. Com. Banc.

is contingent alſo. And it is contingent whether he will dye without Iſſue male. As if a Feoffement be made to the uſe of one for life, and if he had no Heir of his body, to another in fee; that is contingent during the life; And he had not but an Eſtate for life, by that limitation; and then that is deſtroyed by the Fine alſo. And now if nothing was in Edward, nothing can be ſetled in his Son. And then thoſe contigent Remainders being deſtroyed: there is a good eſtate in the Purchaſors; and this ſpecial verdict was not found for any doubt, but for the intricacy of the Indenture. And therefore he prayed Judgement for the Defendant.

Harvey againſt Fitton.

HArvy the Adminiſtrator of Edward Fitton brought an Action of debt upon an Obligation of 200 l. againſt Edward Fitton, and declares of Letters of Adminiſtration committed to him by the Archbiſhop of Canterby, &c. The Defendant ſays, That the Inteſtate became poſſeſſed of Goods in Cheſter within the County of York. And before the purchaſe of the Writ, and after the death of the Inteſtate, I. S. Chancelor of Cheſter committed Adminiſtration to Richard Fitton of all the goods, &c. And that he releaſed to him, and upon that demurs. Bramſton, He doth not ſhew what perſon that Chancellor was, or how he had that Authority to grant Adminiſtration, quod fuit conceſſum per Cur. That for that it was naught. And it was agreed, that the Prerogative of Canterbury does not extend to York.

Dame Buttons Caſe.

DAme Button was Adminiſtratrix of Goods and Chattels of her Huſband. And the Siſters of the Husband would compell her in the Prerogative Court to make Diſtribution; And after ſentence given prays a Prohibition, and divers cauſes were alleged. But Richardſon rejected all, unleſſe it was upon the Statute 21 H. 8. And upon that Statute he ſaid, that upon conference with the Judges, He conceived that it was in the diſcretion of the Court to grant a Prohibition in ſuch Caſes or not, &c. Hutton ſaid, That a Prohibition in ſuch caſes ought to be granted, For he ſaid, if Siſters may come in for portions by Diſtributions, where Couſins cannot. And Siſters have not any colour to have Diſtribution. For although that the Statute of Magna Charta cap. 18. extend a pueris, Yet not All Freres or Siſters. And the Ordinary although heretofore would compell an Executor to make Diſtribution; yet now they never meddle with an Executor. And hath not an Adminiſtrator the ſame power as an Executor? And in Iſabel Towers Caſe a Prohibition was granted. For when they have executed their Authority one time lawfully, they cannot make a Diſtribution. Harvy to the ſame intent. The Ordinary had not ſuch a power upon the Goods of any, eſpecially where Adminiſtration is granted; For then they have put the Property in the Adminiſtrator to pay debts, &c. And there may be a ſleeping debt which by that means ſhall never be ſatisfied. For if the Ordinary might grant Adminiſtration, and afterwards make Diſtribution, His Authority is not warranted, and he does and undoes, and ſo mocks the Statute. In Flames Caſe it was ſaid, that if they are not permitted to make Diſtribution, They will compell it before Adminiſtration ſhall be granted. But they have not any ſuch power; for he ought to commit Adminiſtration if it be demanded. And it was ſo in one Clarks caſe In which the whole Court was of opinion. But Yelverton would not ſhew his opinion in the power of the Ordinary. But he conſented to a Prohibition without other cauſe.

John

Mich. 3 Car. Com. Banc.

Iohn Owens Caſe.

IOhn Owen lived apart from his wife; And upon petition of the Wife to the Juſtices of Aſsiſe for maintenance, they refer'd it to the Biſhop of Bangor; who ordered that he ſhould pay to his Wife 10 l. per annum, which was afterwards confirmed by decree in the Councel of Marches of Wales. And becauſe that Iohn Owen diſobeyed that Decree, and did not pay the 10 l. per annum, the Councel ſent a Meſſenger to apprehend his body; and cauſed his Goods, and the profits of his Lands to be ſequeſtred. And Henden prayed a Prohibition; for that that Alimony was not within their inſtructions. Richardſon demanded of him if they could grant Prohibitions; If they meddle with a thing, which belongs to Eccleſiaſtical power, where they themſelves have power. Harvey was of the ſame opinion. For this Court ſhould preſerve other Courts in order. Yelverton ſaid, For the ſequeſtration of the Lands, they could not do that. Richardſon, They have not any power to ſell the goods. The Eccleſiaſticall Court is the proper Court for Alimony; And if the perſon will not obey, they cannot but excommunicate him. And by Yelverton, when that comes to them from the Biſhop to be confirmed, They cannot but walk in the ſteps of the Biſhop. And a day was given to ſhew, why a Prohibition ſhould not be granted. And ſo it was ruled.

Feakes againſt ——

ONe —— was ſued in the Councel of Marches upon a Bond of 500 l. to pay 40 marks per annum; And he alleged, that he did not intend to take the forfeiture of the Bond, but to compell him to pay the 40 Marks per annum. And a Prohibition was granted to the Court at the motion of Hoskins. For that their inſtructions were not to hold Plea but for, &c. And if this ſhould be permitted, it is but a window to draw more within their Juriſdiction, and alſo the King would loſe his Fines. But he ought to have an Action of Debt. Harvy. If an Obligation was to perform an Annuity of ſuch a ſum by another Deed. The party may bring his Action upon the Obligation or Annuity, And Yelverton ſaid, If it were to perform a Collateral thing, or if the Condition was all one with the Obligation, they cannot ſue for the performance there. Quod nota.

Intra Mich. 3 Car. rot. Banc. 633.

Watſon againſt Vanderlaſh.

VVAtſon brought an Action upon the Caſe againſt Vanderlaſh, for ſcandalous words, and declares, that whereas he was skillfull in the art of Chirurgery, and that he made much gain of that Art of the Kings Subjects that now is, &c. Et colloquio tunc & ibidem habito de peritia ſua in arte Chirurg. &c. et de quodam Matthews nuper ante ſub cura ejus, who is now dead. He ſpake theſe words, Thou didſt kill Mr. Matthews, thou didſt kill him. And upon not guilty pleaded, it was found for the Plaintiff, and an hundred pound dammages given. And now this was urged in arreſt of Judgement by Crew. That he does not allege that he was a Chirurgean at the time of the words ſpoken. So that his allegation to be a Chirurgean, does not include the time &c. that he ſpoke thoſe words; And then his profeſsion is not diſcredited. Secondly, he does not allege, that he died under his cure, but that he is dead; For

Mich. 3. Car. Com. Banc.

if thoſe had been alleged, it would have been more queſtionable. And for that the words are not Actionable. Now a man may kill a man divers wayes, and juſtifie it. As a Miniſter of Juſtice, 14 Eliz. in the Kings Bench, Yates and Boſtocks Caſe. Thou waſt the cauſe that I. S. did hang himſelf, and that I. N. did cut his own throat. And adiudged that they are not Actionable; for he might have committed an Offence, and becauſe the other proſecuted him, he might cut his own throat, or hang himſelf; and ſo this man might be under his cure, and he doe his beſt endeavour to ſave him; but yet he might dye. And the Court does never extend words further than the Law directs them. Coo. 4. 15. Stawloeps Caſe and Hexts Caſe, fol. 20. Barhams Caſe. The Court there does not ſupply that which the words doe not directly imply. And here in this Caſe where the words may have a qualification, they ſhall be taken in mitiori ſenſu. Henden. The word kill generally will bear an Action, becauſe that it ſhall be intended to be felonionſly, as in the Lady Cockains Caſe. Although it was not Felony in facto. But here the words ſo ſpoken and particularly applyed, they will not bear an Action They had a diſcourſe of his skill in Surgery, and of one Matthews, who was ſick of a dangerous diſeaſe. Then that cannot to be intended, it was Felony; objecting the fayler of skill, will not bear an Action. As if I ſhould ſay of a Lawyer, He hath loſt his Clients Cauſe. And as it may be taken in mitiori ſenſu, it cannot be ſtrained to Perjury. And ſo here there can never be intended a voluntary killing. But Bramſton and Finch on the other ſide. That although there are not theſe words Tunc exiſtenti Chirurgeon, yet there are other words which ſupply them; for it is, That when Matthews was under his cure, he was a Chirurgeon, &c. And the words are actionable without other reaſon; for that he impeaches his credit, and implies miſbehaviour in his Art. Hutton. For the Exceptions we ought to intend that he continued a Surgeon, and that his skill continued. And alſo it is ſupplyed. Then being ſpeech of his skill, &c. Which proves that then he was a Sureon. And Then ought to be intended that he is a Chirurgeon; for it is not to be ſuppoſed that he laid aſide his profeſſion in the mean time. And for the words if he had ſaid, For lack of skill of Chirurgery, &c. thou didſt kill him, will bear an Action; for that is a ſlander to his profeſſion. And if one had ſaid, Goe not to ſuch a one, for he hath no skill in Chirurgery, if he be a Chirurgeon, it is actionable. Or if of a Lawyer, Goe not to ſuch a one, &c. for he will deceive you. And the Queſtion will be, whether it ought to be intended that he killed him for want of skill. If one ſayes, Such a one was found dead, and you killed him, there it ſhould be intended murderouſly. And for the Caſe put by Crew, I agree that a man may be a cauſe that another hangs himſelf by imagination. But if one ſayes, You did kill ſuch a one as hanged himſelf, or cut his own throat, that will bear an Action. And ſo it ought to be intended alſo, that when he ſayes of a Chirurgeon, &c. That it was for want of skill. Goe not to ſuch an Inne, the Plague hath been lately there. Theſe words are actionable. for it drives away Guests. Then theſe words were ſpoken to hinder him in his profeſſion and benefit. And becauſe that he dyed under his hands, it ought to be neceſſarily intended, that it was for want of skill. Harvey of the ſame Opinion. Alſo there is ſufficient matter to prove that he was a Chirurgeon at the time of the ſpeaking the words, &c. When he came to the words, it is ſaid that there was a ſpeech between them, &c. and the ſpeech was of his skill, and of Matthews death. If he had ſaid, Thou haſt killed I. S. or murthered I. S. whereas he is living, that will not bear an Action. And ſo alſo it was that he dyed of his diſeaſe, it muſt be by conſequence, that he did not kill him. But it is ſaid that he dyed, that may be by killing. And for that, the word kill without doubt will bear an Action; for if it be not murther, it may be

Han-

Man-ſlaughter And ſo it ſhall be intended if you cannot make a Juſtifica- Mich. 3 Car. Com. Banc.
tion, as a Miniſter of Juſtice, or ſe defendendo. And then when he ſayes that he killed him, it ſhall be meant for want of skill, which is actionable. I. S. hath no more Law than a Horſe. If he had reſembled him to any thing but a Beaſt, it would not maintain an action. But if he ſaid, Goe not to ſuch a one. &c. it is actionable without queſtion. Slander of one in his Trade, will bear an action. And ſo all being conuered alike, it ought to be intended that he killed him in reſpect of his skill. In Caſes of Deſamation Sir George Haſting's Caſe, Thou didſt lye in wait to kill me with a Piſtoll, were actionable. So if one touch another in reſpect of his skill in that that he profeſſes, it will maintain an action, &c. And Yelverton to the ſame purpoſe; for there is a difference between a Profeſsion, and a particular Calling. As if words are ſpoken of one that is a Juſtice of Peace, he ought to ſhew that he was then a Juſtice of Peace, for he is removable, and may be changed every Quarter Seſsions. But as to a Calling, the Calling of every man is his Free hold, 43 E. 3. Grant of an Annuity to one pro conſilio, and he profeſſes Divinity, Phyſick, and Law, there the grant is pro conſilio generally, for Phyſick if that be his uſuall Profeſsion. And it is intended that a man alwayes dyes in his Calling. If he ſaid to I. S. Thou art a murtherer, it ſhall not be intended of Hares for the Judges are not to ſearch ſo far for conſtruction. Loquendum ut vulgus intelligendum et ſapiens. If one ſayes of a Merchant, Put not your Son to him, for hee'l ſtarve him to death. Theſe words are actionable; for that that it comes within the compaſſe of the diſgrace of his Profeſsion. And ſo of a School-maſter, Put not your Son to him, for hee'l come away as very a dunce as he went. Harvey. If one ſayes of a Judge, He is a corrupt Judge. it cannot be meant of his body to be corrupt, but it ſhall be intended of his Profeſsion.

Peitoes Caſe, before.

HEnden for the Defendant, the Caſe is thus. A Rent is granted for life out of Lands which deſcend to the Heir, and he makes a Leaſe of parcell of the Land to the Grantee for years, who ſurrenders the term. Whether the Rent ſhall revive or ſuſpend during the term. And it was ſaid by him, it ſhall revive. Firſt, For that that it is the act of him, who is lyable to the Rent, to accept the ſurrender. And there is a difference, where there is a determination barely by the act of the party, there it ſhall not be revived. For the firſt, 21 H. 7. 9. Tenant in Tayl of a Rent is infeoffed of Land, and he makes a Feoffment of Land with a warranty to B. with Voucher, as of land diſcharged of that Rent. And ſo it is 19 H. 6. 55. Aſcue put this Caſe, Grantee of a rent in Fee and Donee in Tayl of Land, infeoffs the Grantee, who grants that over; and afterwards the iſſue in Tayl recovers in a Formedon, yet the rent ſhall not be revived. But if it had been the joynt act of the parties, as ſo by ſurrender, it ſhould have been revived.

Firſt, It is clear, that if a Chattell perſonall be ſuſpended by Sute, it ſhall be gone for ever. As if a Feme marries the Obligor. 11 H. 7. 25. unleſs ſuſpenſion be in anothers right; if it be by the act of the party, there it ſhall be revived: As if a Feme Executrix marry with the Obligor, and he dyes, the ſuſpenſion is determined, and they are revived againſt the Executors. 7 H. 6. 2. In one Gaſcoines Caſe. Leſſee ſurrenders to the Leſſor, upon condition the rent be ſuſpended; but if the Leſſor enter, for conditions broken, the Rent is revived. Which in effect is our caſe. A rent is granted to the Daughter, and the land deſcends to her and her other Siſter, who make partition. The Rent is revived: for it is the joynt act of both parties. Plow. 15. If a man had a Rent, and diſſeiſes the Tenant of the land, and after the Diſſeiſee re-enters. Where there is a revivor

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Mich. 3 Car. Com. Banc.

of the land, there is a revivor of the Rent; for the diſſeiſin was the cauſe of the ſuſpenſion, and that now is gone.

Secondly, Becauſe that when the Leſſee for years ſurrenders, the term is determined to all purpoſes, and the Leſſor is in of his Eſtate in Fee; and there is a diverſity of ſurrender in reſpect of a ſtranger; for to a ſtranger it may have Eſſence after ſurrender. But as to himſelf it is otherwiſe extinct. And he cannot ſay that it had any Eſſence. 5 H. 5. 12. But in reſpect of a ſtranger it has continuance, as if an Executor ſurrenders, yet it ſhall be aſſets. And all acts done upon Leſſee for life before ſurrender, ſhall have a continuance after. And ſo he prayed Judgement for the Avowant. But more after.

Wakeman againſt Hawkins.

IT was ſaid, That if an Executor was ſued in this Court by Original he ſhall not put in Bayl. But if he be arreſted in an inferiour Court and removed by Habeas corpus, he ought to put in Bayl.

Stamford and Coopers Caſe.

Hutt 95

STamford and Coopers Caſe was thus. I. S. acknowledges a Statute to Cooper the 22 January, and afterwards he confeſſes a Judgement to Stamford the 23 of January next enſuing the Statute. And it is extended. And Stamford brought a Scire fac. againſt Cooper (to wit now) becauſe he ought not to have the land by Elegit. And the Queſtion was, whether the Judgement by relation ſhall defeat the Statute. And it was reſolved, That the Judgement ſhall have relation to the Eſſoin day, which is the 20 day of January, for that is the firſt day of the term legally; and the fourth day after is the firſt day of the Term open. Dyer 301. Pla. 10. A Releaſe was pleaded after the laſt continuance, and it bore date the 21 of January, which was after the day of Eſſoin, de Octab. Hil. And for that nought, becauſe that it came late; for it ought to have been after the laſt continuance, and before the laſt day, &c. 33 H. 6. 45. Niſi prius was taken after the day of the return, and before the fourth day after; and adjudged nought, becauſe that the day of the return, which is the Utas, is the firſt day of the term, and the fourth day after but a day of Grace, and that is the difference. If a man be obliged to pay money the firſt day of the Term, he ſhall not pay it but upon the fourth day after, for that is the firſt day in all common acceptance. But in all legall proceedings, the firſt day is the Eſſoin day. And ſo it was adjudged, 16 Eliz. And in the Kings Bench it was in one Williams Caſe. A Judgement was given the 20 of January, and a Releaſe of all Errours the 21 January, and adjudged that that bars the Judgement given the 20 January; although it was not entred the fourth day after. A Juſtice in the Kings Bench examined an Infant upon inſpection the Eſſoin day, and found him to be under age and would not permit him to confeſs a Judgement, although that he would have come to full age the fourth day after. The Court agreed that one may be nonſuited the Eſſoyn day; and if he confeſs an Action that day, it ſhall be good. And thereupon Judgement was given that by the relation, the Statute ſhould be avoided, &c.

1 Bulſ 35

Crookes Caſe.

5 Co. 10 a Ke. 162

A Feme ſole leaſes at the will of the Leſſor, and after the Feme takes an husband. If by the taking of the Baron, the will of the Feme be determined, and it was thought not.

Fenne

Hil. 3 Car. Com. Banc.

Fenne againſt Thomas.

A Man inhabiting in the moſt remote part of England, was arreſted eight times by Latitat, and no Declaration is put in. And the Counſell prayed Coſts for the Defendant. The Prothonotary ſaid that he ſhall not have Coſts, unleſs he come in perſon. But Richardſon ſaid on the contrary, and he ſhall have Coſts; for it appears that he had been put to travell, and a day given to ſhew cauſe why the Coſts ſhall not be given. Banco Reg.

Spark againſt Spark.

SPark brought an Ejectione firmæ againſt Spark, for lands in Hawkſchurch in the County of Dorſet. The Caſe was, a Copy was leaſed for a year except one day, and that was found in the Verdict to be warranted by the Cuſtome. The ſole Queſtion is, if an Ejectione firmæ lyes. And by Hutton, If Tenant at will makes a Leaſe for years, an Ejectione firmæ lyes; but if it be a Copy-hold for years, an Ejectione firmæ will not be maintained.

Deakins's Caſe.

IT was ſaid at the Bar, and not gain-ſayed, If a man perjure himſelf againſt two, the one by himſelf cannot have an Action upon the Statute, but they ought to joyn; for he is not the only party grieved.

Bentons Caſe.

A Man Leaſes for life, and afterwards Leaſes for years to commence after the death of the Leſſee for life, rendring Rent, the Reverſion is granted. Tenant for life dyes, Leſſee for years does not attourn. And it ſeemed, That the reverſion paſſes without Attournment. And he ſhall have Debt, or ſhall Avow.

Williams againſt Thirkill.

AN Action of Debt was brought by Williams againſt Thirkill, Executor of I. S. who pleads a Receipt againſt him of 300. l. over and above which non, &c. The Plaintiff replies that the receipt was by Covin. And ſo they are at iſſue, and it was found for the Plaintiff, and judgement was entred de bonis Teſtatoris. And it was ſaid by the by in this Caſe, That Debt by Parol may be forgiven or diſcharged by Parol.

Ploughman a Conſtables Caſe.

PLoughman a Conſtable ſuffers one, who was arreſted pro quadam felonia antea fact. to Eſcape. And becauſe it is not ſhewed what Felony it was, and when it was done (for it may be it was done before the Generall Pardon) the party was diſcharged.

Hobſons Caſe.

VPon an Indictment of Forcible Entry Quod ingreſſ. eſt unum Meſſuag. inde exiſtens liberum Tenement. I. S. And becauſe he does not ſay Adtunc exiſtens; and without that it cannot refer to the preſent time (ſcilicet) of the Indictment, He was diſcharged.

Sir

Hil. 3 Car. Com. Banc.

Sir Thomas Holt againſt Sir Thomas Sandbach.

Hill 26 Eliz 137 & Mich 4

SIr Thomas Holt brought Treſpaſs againſt Sir Thomas Sandbach quare vi & armis. Becauſe, whereas the Plaintiff had uſed time out of mind, &c. to have a Water-courſe by the Land of the Defendant; So that the water run through the Land of the Defendant, to the Land of the Plaintiff. The Defendant (he ſaid) had vi & armis made a certain Bank in his own Land, ſo that the water could not have his direct courſe as it was wont to have. Harvey, It ſeems to me that the Action does not lye. For a man cannot have an action of Treſpaſs againſt me vi & armis for doing of a thing in my own Soyl. But Treſpaſs vi & armis lyes againſt a Stranger, who comes upon the Land and takes away my Cattell; And ſuch like things: but not in this Caſe. But he may have an Aſsiſe of Nuſance. As in Caſe where one makes an Houſe joyning to my Houſe; So that it darkens my Houſe, by the erection of a new Houſe; I may have an Aſsiſe of Nuſance againſt him who does it. But Crook was on the contrary. But it ſeemed to Richardſon, that he ſhall have Treſpaſs on his Caſe, but not vi & armis. And to that which hath been ſaid, That if one build a Houſe to the nuſance of another upon his own Land, That he to whom the nuſance is done, may have an Aſsiſe of Nuſance, that is true; And alſo if he will he may pull and beat down ſuch an Houſe, ſo built to his Nuſance; if he can do it upon his own Land. But he cannot come upon the Land of the other, where the Nuſance is done to beat it down per que, &c. Hutton of the ſame opinion. By which it was awarded that the Writ ſhall abate. And he put to his Action upon the Caſe.

Vid 167 1 Bulſt 105 2 Bulſt 220 273 2 Cr 227 233 310 10 Co 127 4 Leon 247 1 Bulſt 1

Hitcham moved a Caſe to the Juſtices. One I. by Indenture covenants with an other that he ſhould pay him annually during his life 20 l. at the Feaſt of St. Michael, or within 20 daies after, 10 l. and at the Feaſt of our Lady, or within 20 daies after, 10 l. The Grantee before the 20 daies paſſe, and after the Feaſt of our Lady dies. If the Executors of the Grantee ſhall have the Rent or not. And the Juſtices, Hutton being abſent ſaid, That it was a good Caſe. And ſaid that the Executors ſhall not have it; Becauſe it is not at all due, untill the 20th day be paſt.

Fawkners Caſe.

A Leaſe was made to one for 40 years, the Leſſee makes his Teſtament, and by that deviſes it the term to I. S. for term of his life, if he ſhall live untill the ſaid term be expired; And if he dies before the years expire, then the remainder of the years to F. for term of his life. and if he die before the term be expired, the remainder of the years to the Churchwardens of S. I. If the remainder to the ſaid Church ſhall be good or not was the Queſtion. Becauſe that the Wardens of the Church are not corporate ſo that they may take by that Grant. Hutton and Harvy ſaid that the Remainder was not good to them. And ſaid that the firſt Remainder was not good.

Peters

Hil. 3 Car. Com. Banc.

Peters againſt Field.

A Bill obligatory was ſhewed to the Court, in Debt brought upon it; And in the end of the Bill were theſe words, In witneſſe whereof I have hereunto ſet my hand, and he had writ his name, and put to his Seal alſo. And becauſe no mention was made in the Bill of no Seal to be put to the Bill, It was moved to the Juſtices, If the Bill be good or not. And it was agreed by the whole Court that the Bill was good enough.

Tomlinſons Caſe.

A Parſon makes a Leaſe for 21 years, The Patron and Ordinary confirm his Eſtate for 7 years; the Parſon dies, The Queſtion is, Whether that confirmation made the Leaſe good for 21 years, or but for 7 years. And it ſeemed to Hutton, that the Leaſe was confirmed but for 7 years. But Richardſon was of the contrary opinion, and took a difference, where they confirm the Eſtate, and where they confirm the Land for 7 years; That Confirmation confirms all his Eſtate; But where they confirm the Land for 7 years; That Confirmation ſhall not enure but according to the Confirmation. And that difference was agreed by Crook, and all the Sergeants at the Bar. And afterwards Hutton ſaid, That that was a good Caſe to be conſidered, and to be moved again.

Jacobs's Caſe.

Mo.

A Man was indicted at Newgate, For that he feloniouſly vi & armis had robbed a man in a certain Kings foot-way leading to London from Highgate. And upon that he was arraigned & found guilty; And having his judgment, he prayed his Clergy for that he was a Clark. And the Juſtices of Gaol delivery doubted if he ſhould have his Clergy or not, Becauſe the Statute, if any man be taken upon Felony committed on the High way, he ſhall not have his Clergy. But the Indictment was in this caſe, that the Felony was done in alta via reg. pedeſtri. So that the words are not alta via regis, nec in magna via regia, nec in via regia. For if that word pedeſtri had been put out of the Indictment, he ſhould not have had his Clergy clearly. Some of the Juſtices were of opinion, that that word added in the Indictment made that he ſhould not have his Clergy. The Lord chief Baron of the contrary opinion.

Perkins againſt Butterfield.

Hitcham moved to the Juſtices, If one takes Beaſts Dammage feaſant, and impounds them in an Houſe, and leaves the Door open, ſo that the Owner may ſee them and give them ſuſtenance; And afterwards for default of Suſtenance they dye in the Pound. Whether he who diſtreyned them ſhall be charged or not. Hutton, when one takes Beaſts Dammage feaſant in his Land, It is at his Election, if he will impound them in an open place where the Pound is, or in ſome place in his own Land. And if he impound them in the common Pound, and the Beaſts dye, the Owner has no remedy. But if they be impounded upon the Soyl where they did the Dammage: or in the Houſes of him who diſtreyned them, and they dye for want of Food, In this he who took them ſhall be charged. For the Common Pound is common to all Perſons,

Hil. 3 Car. Com Banc.

ſons, ſo that they may come to give them food. Otherwiſe in this caſe, For there the Owner cannot have notice where he hath made his Pound. Richardſon of the ſame opinion. And I believe that the Owner ſhall have an action upon his Caſe againſt the Owner for the recovery of the value of his Cattell. For treſpaſs does not lye; For the taking of them and the impounding was lawfull. And it is reaſon that he ſhould recover the value of them by an Action. For if the Owner had come to have given them food, the Terre-tenant would have an action againſt him. Hitcham, The taking of them is made a Treſpaſs ab initio, when the Beaſts dyed in Pound.

Wimberly againſt Taylor et alios.

WImberly had entred a Plaint in a Court Baron againſt two jointly, for taking of his Goods; And the Plaintiff had removed the Plaint by a Recordare jointly, as the Plaint is. And now at this time the Plaintiff counts of taking of Goods ſeverally. So that it varies from the Plaint and the Recordare alſo. And Ward moved that the Writ might abate. And ſo it was adjudged by Hutton and the Juſtices.

Wilkinſons Caſe.

IT was moved at the Bar, If a Man makes a Leaſe for years to I. S. I. N. and I. D. If the aforeſaid I. S. &c. ſhould ſo long live; And now one of the Leſſees is dead. If the whole Leaſe ſhould be determined or not was the Queſtion. And Hutton and Harvey ſaid, That it was without doubt that the Leaſe was determined by the death of one of them. But if the words had been generally, If the Leſſees ſhould ſo long live, and has not named them, Then perchance it ſhould have been more doubtfull.

The Executors of Tomlins's Caſe.

ATthowe demanded this Queſtion of the Juſtices. A Leaſe is made for years, the Leſſee grants over his Eſtate and reſerves to him and his heirs during the term a certain Rent. If the Executors or the Heir of the heir ſhall have that Rent. And it ſeems to me, that it ſhall enure to the heir well enough. As a Grant made by the Grantee of the eſtate of the ſame Rent. So the Heir ſhall take by the Grant Harvy, May the Heir take Chattel as Heir to his Father And this Rent is but a Chattel. And in the Book of Aſsiſe; there is a Caſe where Lands are given to I. S. et uni hæredi ſuo, et uni hæredi ipſius hæredis tantum. And that was taken to be no Fee-ſimple; Nor no ſuch Eſtate that the Heir might claim as Heir to his Father. But I am in doubt of your Caſe truly. For which I will adviſe. Hitcham, Upon that I have ſeen a Diverſity. Where Lands are given to I. S. et hæredi ſuo, et hæredi hæredis I. S. In that Caſe he ſhall have a Fee-ſimple; Otherwiſe it is, where Lands are given to I. S. et hæredi ſuo; There no Fee-ſimple paſſes. Richardſon, There no Fee-ſimple paſſes in any of the Caſes. And it was ſaid in the Argument, That Leſſee ſhall not have Treſpaſs vi et armis againſt his Leſſor.

Whid-

Hil. 3 Car. Com. Banc

Whiddon's Caſe.

A Man deviſes by his Teſtament to his Daughter Jane all his Land in D. habendum ſibi et hæred. de corpore ſuo legitime proc. And by the ſame Teſtament he deviſes to his Daughter Anne, all his Land in the tenure of I. S. in the County of Hertford. Whereas in truth D. was in the County of Hertford, and parcel of the Lands were in the tenure of I. S. Whether Jane ſhall have the Lands in D. in the tenure of I. S. by the firſt words: Or Anne ſhall have them by the laſt words. Harvey; The Teſtator had given them by his firſt words to Jane. Wherefore he cannot revoke his Gift, and give it afterwards to another Daughter. But all the Juſtices were of the contrary opinion.

A Caſe of Executors.

IF Executors come to the Ordinary for to prove the Will; He ought to prove it ex communi jure. And that he may do without great examination of the Witneſſes. But if other Executors come afterwards to prove a later Will; Then the Ordinary ought to be circumſpect in the probation of that Will, and to do it by proofs; For that is de mero Jure. And it is the better and of more effect, by Athowe.

Challoner againſt Ware.

A Man makes a Leaſe for years, reſerving a certain rent payable at the Feaſt of St. Michael. And for default of payment at the ſaid day, and by the ſpace of 40 daies after, That it ſhall be lawfull to the Lessor to reenter without any demand of the Rent. The Rent is in arrear by 40 daies after the Feaſt of Saint Michael, and no demand of the Rent made by the Lessor; Whereupon the Lessor entred. If that Entry were lawfull was the Queſtion. And by Hutton it is not. For a demand of the Rent is given by the Common law between Lessor and Leſſee: And notwithſtanding the words (without any demand) it remains as it was before. And is not altered by them. But if the Rent had been reſerved payable at another place, than upon the Land; There the Lessor may enter without any demand. But where no place is limitted but upon the Land, otherwiſe it is. Richardſon to the contrary. For when he had covenanted that he might enter without any demand; The Leſſee had diſpenſed with the Common law by his own Covenant. As the Lessor might by his Covenant, when he makes a Leaſe Sans impeachment di waſte, He had diſpenced with the Common law, which gives the Action of Waſte. Harvey of the ſame opinion. If a Man leaſes Lands for years with a Clauſe, That if the Rent be in Arrear by forty daies after the day of payment; That the term ſhall ceaſe; If the Rent be in arrear by the ſaid forty daies after the day of payment, The Lessor may enter without requeſt.

Conyers's Caſe.

ONe Thompſon makes a Leaſe for forty years, to Conyers by Indenture, and in the ſame Indenture covenants, and grants to the Leſſee, That he ſhall take convenient Houſe-boot, Fire-boot, and Cart-boot in toto boſco ſuo vocato S. wood within the Pariſh of S. And thoſe Woods are not parcel of the Land leaſed, but other Lands.

Mil. 3 Car. Com. Banc.

Atthow, I would fain know your opinion, if that Grant of Eſtovers out of an other place, than was the Leaſe, be good? Alſo what Eſtate the Grantée of Houſe-boot, and Fire-boot ſhall have by that. For the words are from time to time, and hath limited no time in certain. And laſtly, If the Leſſée be excluded to have Houſe-boot and Fire-boot in the Land leaſed; or if he ſhall have in both places. Alſo if the Executors by that Grant to the Leſſee ſhall have Houſe-boot and Fire boot. And it was agreed by Hutton and Harvey, That that Grant was good, and that the Grantee ſhall have it during the Term. And that that grant does not reſtrain him But that he ſhall have houſe-bot and fire-bot in the land leaſed alſo. Atthowe. If there be no great Timber upon the land leaſed, and the houſes are in decay. if the Leſſor ought to find and allow to the Leſſée ſufficient Timber for the making the reparations; or if the Leſſée at his own coſts ought to find the Timber for the reparations of the houſe. Hutton ſaid, That the great Timber ſhall be at the coſts of the Leſſor, if no Timber be upon the land leaſed, nor no default be in the Leſſee in ſuffering the great timber to go to decay or to putrifie. And it was agréed, if the Leſſor cut a tree and carry it out of the Land, That the Leſſee may have an Action of Treſpaſs; And if Stranger cut a tree, the leſſee ſhall have an action of Treſpaſs and recover treble dammages; As the leſſor ſhould recover againſt him in an action of waſte

Wakemans Caſe.

A Man ſeiſed of a Manor parcell demeſn, and parcell in ſervice, deviſes by his Teſtament to his wife during her life all the demeſn lands; alſo by the ſame Teſtament he deviſes to her all the ſervices of chief Rents for 15 years. And moreover by the ſame Teſtament he deviſes the ſame Manor to another after the death of his wife. And it was agreed by all the Juſtices, That the deviſe ſhall not take effect for no part of the Manor, as to the ſtranger, untill after the death of the wife. And that the heir after the 15 years paſſed, during the life of the wife, ſhall have the ſervices and chief Rents.

Jenkins againſt Dawſon.

IN a Formedon, the Demandant makes his Conveyance in the Writ, by the gift of I. S. who gave it to . D. et hæredibus de corp. ſuo legitime procreat. And ſhewes in the Writ that he was heir to the Son and heir of I. D. Son and heir of W. D. the Donee. And Hitcham demanded Judgement of the Writ, for this Cauſe. And the Court ſaid that the Writ was not good; for he ought not to make mention in the Writ, of every heir, as he does here. But he ought to make himſelf heir to him who dyed laſt ſeiſed of the Eſtate Tayl, as his Father or other Anceſtor. Alſo that word procreat. ought not to be in the Writ, but Exeuntibus. But the Court thought that it might be amended. And Harvey ſaid, If falſe Latin be in the Writ, it ſhall be amended; as if in a Formedon the Writ be Conſanguineu-, where it ſhould have been Conſanguineo. Hutton and all the other Juſtices ſaid, that that might be amended by the Statute.

Saulkells Caſe.

IN an Attaint the grand Jury appeared, and the petit Jury and the parties alſo, and one Rudſtone Maſter of the Servant in the Attaint, came to the Bar, and there ſpoke in the matter, as if he had been of counſell with his Servant. Crawley ſaid to him, Are you a party to this Sute?

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or for what cauſe do you ſpeak at the Bar? And he anſwered, that he had done this for his Servant And if he had done any thing againſt the Law he knew not ſo much before. Hutton, You may, if you did owe any money to your Servant for his wages, give to his Counſel ſo much as is behind of it, and that is not maintenance: Or you may go with your Servant to retein Counſel for him; So that your Servant pay for his Counſel. But that that you have done is apparent maintenance. And the Kings Sergeant prayed; That he may be awarded to the Fleet and pay a Fine. And Hutton upon adviſe ſent him to the Fleet. *Hil. 3. Car. Com. Banc.*

Wiggons againſt Darcy.

DArcy was in Execution upon a Statute Marchant, and his Body and Goods were taken. And the Coniſee agreed that the Coniſor ſhould go at large, and he went at large. Althowe moved, If that were a diſcharge of the Execution or not. And Richardſon ſaid it was. For his impriſonment is for his Execution. And if he releaſe his impriſonment he releaſes his Execution. And ſo if two men be in Execution for one Debt, and the Plaintiff releaſes to one of them, That is a releaſe to both. And ſo if one had two acres in Execution, and the Plaintiff releaſe the Execution of one of them, It enures to both. Harvey on the contrary opinion. Yet I will agree, That if a man be one time in Execution, The Plaintiff ſhall not another time have an Execution. For after a cap. ad ſatisfac. an Elegit does not lye. But in the Caſe where the Coniſee does releaſe the impriſonment only, and not the Execution (for it is not but a liberty given by the Coniſee to the Coniſor to be at large) That does not releaſe the Execution.

Dolbins Caſe.

IN a Replevin the parties were at Iſſue, and the Plaintiff ſued a Venire fac. returnable ſuch a day, at which day the Sheriff does not return the Writ; Wherefore the Avowant by Ward prayed a Venire fac. with a proviſo for him. And it was granted by the whole Court.

Foſſams Caſe.

A Man after the Statute of 27 H. 8. makes a Feoffment in Fee to the uſe of himſelf for term of his life, and after his decreaſe, to the uſe of I.S. and his Heirs. The Feoffor does waſte; And I. S. brought his Action of Waſte. And now if his Writ ſhall be general or ſpecial was the Demur in Judgement. And Hutton, and the other Juſtices were clearly of opinion, That the Plaintiff ought to have a ſpecial Writ And ſo it was adjudged afterwards.

Doſwell againſt Iames.

IN Debt brought upon an Obligation, Iames ſhews that the Obligation was endorſed with a Condition to perform all the Covenants compriſed in an Indenture, and he pleads that all the Covenants were fulfilled; And does not ſhew in certainty the Covenants, nor how they were performed. And Hitcham ſaid, that the Plea was not good. For there is a Diverſity, when one pleads in the Affirmative and when in the Negative. For if in the Affirmative he ſhews in the certainty how the Condition or Covenants were performed. And there is no diverſity

Hil. 3. Car. Com. Banc.

ty in my opinion, between the Conditions which were upon the doſed Obligation, and the Covenants in the Indenture. And it is to be thought, that he who knows more of the Truth, ſhould ſhew it in his Plea. And therefore he who pleads the Affirmative, ſhews how the Conditions are performed. Becauſe it lyes much in his knowledge; Whether he hath performed them or not. But where he pleads in the Negative otherwiſe it is. For there he is not to ſhew the certainty. And yet I will agree, that if one brings an Action of Debt upon an Obligation indorſed with a Condition, The Defendant may plead the Conditions performed generally. But otherwiſe it is of Covenants in an Indenture. And in an Obligation with a Condition endorſed, if he pleads the Conditions performed, and he ſhews what thing he hath done: If it be in the Affirmative, he ought to ſhew the certainty of it alſo. So that for that cauſe the Plea will not avayl. Alſo it is incertain and doubtfull to the Jury. For if in that Caſe, we are at Iſſue upon ſuch a general Plea, Although it ſhall be tryed by the Jury, Yet it would be ſtrange to enquire of ſuch general things. Wherefore, &c.

Gerrard againſt Boden.

AN Annuity was brought by Gerrard againſt the Parſon of B. And the Plaintiff counts, That the ſaid Parſon granted an Annuity of 40 l. pro bono conſilio ſuo impoſter. impenſo, for term of life of the ſaid Parſon. And for 30 l. of arrerages this Action was brought. Finch, thought the Count not to be good. And firſt it is to be conſidered, If that Annuity might be aſsigned and granted over or not. And as I think it cannot. For an Annuity is not but as a ſum of mony, to be paid to the Grantee by the Grantor. And not at all to the realty, if the Land be not charged by expreſs words in the ſame Deed. And to prove it, If a man grant an Annuity to me and my Heirs, without naming of my Heirs; If the Annuity be denied, it is gone; Becauſe my Perſon is only charged with the Annuity, and not the Land. So if a man grants to you the Stewardſhip of his Manor of D. and to your Heirs, you cannot grant that over. And ſo of a Bayliwick. But peradventure it may be ſaid, That an Annuity may be granted over in this Caſe. Becauſe in the Habendum, It is ſaid to the Aſsignees of the Grantee. But that is nothing to the purpoſe, as I think. For I take a difference when a thing comes in the Habendum of a Deed, which declares the Premiſes of the Deed; For there it ſhall be taken effectuall, but otherwiſe not. As if Lands be given to a man and his Heirs habendum ſibi & hæred. de corpore ſuo procreat. That is a good tayl. But if a thing comes in the Hab-nd. which is repugnant to the Premiſes of the Deed, and to the matter of the thing which is given by the Deed, Then the Habend. is void for that parcel. As in the Caſe at Bar, it is meerly contrary to the nature of the Annuity to be aſsigned over to another. And there is no remedy given for it but an Action, and it is Common learning, that a thing in Action cannot be aſsigned over unleſs it be by the grant of the King. Alſo by their Declaration, they have acknowledged it to be no more than a choſe in actior. Then a Rent ſeek for which he had not any other remedy but an Action after Seiſin. For he ſaid that he was ſeiſed in his Demeſn as of Franktenement of the Rent aforeſaid. Then it ought to be a Rent-ſeek. For of no other Rent can a man be ſeiſed in his Demeſn; becauſe they lye in prend. As of Advowſons common for years, and of Eſtovers. And I will not agree that difference put by Littleton in his Book to this purpoſe. For of ſuch things which lye in manual occupation or receipt, A man ſhall not ſay that he was ſeiſed

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in his Demeſn as of a Rent. Becauſe it lyes in the preend. And in the 21 E. 4. The Caſe is doubtfull, And Crawley of the ſame opinion. Hitcham of the contrary. And at another day Hutton ſaid that the parties were agreed. Hitcham, We deſire to have your opinion notwithſtanding for our learning. Hutton ſaid, We are agreed, that the Annuity may be granted over, and it is not ſo much in the perſonalty as hath been argued by Finch. And in ſome Books it is ſaid, that a Releaſe of perſonal Actions is not a Plea in a Writ of Annuity. *Paſc. 4 Car. Com. Banc.*

Groves againſt Osborn.

THe Caſe was thus, A man makes a Leaſe for life, the Remainder for life upon Condition, that if the ſecond Leſſee for life dye in the life of the firſt Leſſer; That the Remainder in fee ſhall be to another. And it was ſaid, That that Remainder might commence upon that Condition well enough. It was ſaid by Archowe, That where a Remainder depends upon a determination of another Eſtate, So that none ſhall take any Eſtate by the Remainder upon Condition, then the Remainder is good. As if a man give Lands to A. for life, upon Condition, that if I. S. pay me 40s. before ſuch a day: That the Remainder ſhall be to him; That is a good Remainder. But when an Eſtate is to be defeated by a Remainder depending upon that, Then the Remainder is not good. As if I leaſe Lands for life, upon Condition, That if the Rent be in arrear that the Remainder ſhall be to a Stranger, that Remainder is not good. Hutton ſaid, that in my opinion my Brother Archow ſpoke well, and ſo it was affirmed.

Bateman againſt Ford.

AN action of the Caſe was brought againſt Ford, who had called the Plaintiff Thief, and that he had ſtollen from him a yard of Velvet, and a yard of Damask. The Defendant ſaid, that he ſaid that the Plaintiff had taken and bribed from him as much mony, as he had for a yard of Velvet and Damask, and juſtifies Hitcham ſaid, that the Juſtification is not good. For the words that he juſtifies do, not amount to ſo much as to affirm a Felony in the Plaintiff, where the Plaintiff counts that the Defendant ſlandered him of a Felony. Hutton ſaid. What difference is there, when you ſay that I have bribed your Horſe, and when you ſay that I have robbed you of your Horſe. Henden, one may take Goods, and yet it is not felony.

Termino Paſc. Anno 4. Car. Regis Com. Banc.

Norris againſt Iſham,

IN an Eject. firm. by Norris againſt Iſham, Theſe things happened in Evidence to the Jury. Firſt it was cited by Richardſon and Hutton to be Hurtilons Caſe. That an Eject. firm. cannot be of a Manor, Becauſe that there cannot be an Ejectment of the Services: But if they do expreſs further a quantity of acres it is ſufficient. It was ſaid by Crook Juſtice, and not denyed; That if a Leaſe is made of 5 acres to try a Title in an Eject. firm. And of the 3 acres he will make a leaſe. But in the other 2 he will not; If the livery be in the 3 acres the other 2 does not

Hil. 3 Car. com. Banc.

not paſs. Part of the Evidence was, That the Counteſs of Salisbury being ſeiſed of the Lands in Queſtion, makes a Leaſe of them by words of Demiſe, Bargain, and Sale to Judge Crook for a Month, to begin the 29 September, habendum a date, and it was delivered the 3 of September. And the ſame day he bargains and ſells the Reverſion. Davenport, Becauſe that no Entry appears by the Leſſees by vertue of the Demiſe, he ſubmitted to the Court, If there was any ſuch Reverſion in the Grantor he being in poſſeſſion, And this difference was a greed, That if one demiſes Lands for years, and Grants the Reverſion before Entry of the Leſſee. The Grant is void. As it is in Saffins Caſe. Cook 5. 12. 46. But if a man bargain and ſell for years, and grants the Reverſion before Entry of the Leſſee, it is good. For the Statute transfers the Poſſeſſion to the uſe. As if a man bargain and ſells in fee or for life, and the Deed is inrolled. The Bargainee is in poſſeſſion of the Frank-tenement. And ſo it is of a Leaſe for years which is a Chattell. And by Crook, In the Court of Wards that very point was reſolved. Davenport, Alſo there are words of Demiſe, and Bargain, and Sale, before which the Leſſee had his Election to take by which he would. As Sir Rowland Heyards Caſe is. But by Hutton, and it was not denyed. He ſhould be in by the Bargain and Sale before Election; For that is more for his advantage. Further the Evidence was, That George Earl of Salisbury made a Leaſe of thoſe Lands which were a Mannor, And makes a Conveyance from himſelf for life with divers Remainders; and then to the uſe of the Daughter or Daughters of the ſaid George. And the heirs males of their bodies the remainder to the heirs of the body of the ſaid George, &c. and had 3 Daughters to whom the Remainder. The firſt dyed without Iſſue the, 2d. dyed having Iſſue male, the 3d. bargains & ſells all her half part, and pur part to Edw. Earl of Salisbury; Who now being ſeiſed of a third part of the Eſtate of Inheritance, and of the other two parts for his life, and the lives of the 3 Daughters, ſuffers a common recovery by the name of the moyety of the Mannor. And the doubt was, what paſſed. Richardſon, By that there is not paſſed but the moyety of the third part. Hutton, Crook, and Yelverton were on the contrary opinion, and ſaid that by that, All the third part paſſed alſo. Yelverton, If a man be ſeiſed of the manno of Dale, and buys half for life of another in fee, and makes a Feoffment of the half of the Mannor; The moyety which he had in Fee ſhall paſs. And there ſhall be a forfeiture for no part. Which was agreed by the Court. If a man be ſeiſed of the third part, and grants the moyety, perhaps the moyety of the third part only paſſes. But he is ſeiſed of all. Richardſon, There are ſeveral Eſtates, and moyety goes to that Eſtate which he had in the Mannor. For when I grant more than I can grant, that which paſſes paſſes. Crook I had the third part of a Mannor, and grant the moyety of the Mannor; all my third part paſſes. But in the Bargain and Sale, the words were part et pur part. Which as it was paſſed all. And alſo the Covenant to the Leſſor; The Recovery was of the half part & pur part. And by Hutton, Crook, Yelverton, All was intended to be recovered, And then the word Moyety carries that treſbien. Richardſon, That Indentures of Covenant much mends the Caſe. Another Queſtion upon the Evidence was, Whether when a Bargain and ſale is made of Lands; And the Bargainee before inrollment makes a Leaſe for years, and afterwards it is enrolled. If the Leaſe now be good. Richardſon and Yelverton, It ſhall be, that although it be after acknowledgement, and before inrollment, yet it is naught. And by Yelverton and Crook it was ſo adjudged in Bellingham and Hortons Caſe; That if one ſells in fee, and before inrollment, the Bargainee bargains and ſells to another; And afterwards comes an Inrollment. That ſecond Bargain

gain and ſale is void. And an other Queſtion was. If one makes a Leaſe for years, by Indenture, of Lands which he had not; If the Jury be eſtopped to find that no Leaſe. And by Richardſon, If the finding that no Leaſe be ſubject to an attaint. But they ſhould find the ſpecial matter. And then the Judges would judge that a good Leaſe. And Sergeant Barkley cited Rawlins's Caſe, Coo. 4. 43. to that purpoſe. Crook and Hutton againſt him. And Crook ſaid, That it was adjudged in London in Sammes caſe, That that is not an Eſtoppel to the Jury. Which was affirmed by Hutton. And that they may find the ſpecial matter; And then the Judges ought to find that it is not a good Leaſe. And Hutton ſaid, That there is a difference between a ſpecial Verdict and pleading in that caſe. For in ſpecial pleading and Verdict is conſeſt by all parties; That he had not any thing in the Leaſe. And then the Judges gave Judgment accordingly.

Paſc. 4. Car. Com. Banc

1 Lion 206
Dy 90
19 Eliz 347 a 227 a
Sav 99 Mar 164 Hill 10
3 Cro 240 265

The King againſt Clough.

IN the caſe of a Quare impedit by the King againſt Clough before, Richardſon ſhewed how the Quare impedit was brought by King James, and Demurrer joyned then, and after they demiſed to the King, whereof the Court was not before informed. Wherefore although that for the matter they then ſhew'd their opinions; Yet they were all reſolved, That the Quare impedit ought to abate. And that Brownlowe chief Prothonotary had ſhewed them, a Reſolution in King James's time in this Court, by all the Judges to this purpoſe, and the difference of the Information. For after the Demiſe to the King, the information dyed. As it is ſo it cannot be aided by the Kings Court. For is it within that Statute of 1 E. 6. 7. For that Statute is between party and party. In debt for Recuſancy where another brought an action in Right of the Crown.

Iacob againſt Iacob.

IN Debt, The Iſſue was, Whether the mony was paid or not. And the venue was laid of the Pariſh of Ipſwich, and the return of the Sheriff was of Woolbridge. And Hitcham ſaid, That there is not any venue. And the Defendant upon the Statute (if there be any tryall) if any part of the venue be laid in the Tryal) is ayded. But if there be not any part laid, then he is not ayded. Richardſon ſaid, If an action of Debt be brought of Treſpaſs done at Dale, where not guilty being pleaded, the iſſue is de vicenet. de Dale, and the return is de Dale, That is not good. Hitcham Sergeant affirmed that it was. Richardſon and Hutton alſo agreed. Nomina iurata to be good; And then what Action ſoever the Sheriff doth is not material, and the Writ is right. Hitcham, I confeſs for any man (collaterally) to inform that there is not any thing of Ipſwich ſhall not be allowed. But ſo it appears to us upon the Record. Richardſon, it may be intended, That Woolbridge is de vicenet. de Ipſwich. And adjourned. But afterwards it appeared, That the Venire fac. was of Woolbridge. And then all agreed that it was naught. And a new Venire fac. ought to iſſue, &c.

Pale. 1. Car. mr.

Swintons Caſe.

SWinton aſsigns Debt upon an Obligation to another, who ſues in his name, and declares upon an Obligation of 70 l. And the Defendant pleads non eſt factum. And a ſpecial verdict was found, That the Defendant was bound to Swinton, per quoddam ſcriptum Obligatorium gerens dat. eiſdem die & anno, As the Obligation upon which the Declaration was, cujus tenor ſequitur in hæc verba, &c. And the Obligation was in 70 l. and that that is the ſame Obligation which was given in evidence. But whether that is the ſame, as it ſhould be, which they declare, Juratores penitus ignorant, &c. Davenport, for the Defendant prays Judgment: & alleges that the Verdict is per quoddam. And therfore it cannot be intended to be the ſame obligation upon which he declar'd. For then it ought to be prædict. But Hutton and Yelverton thought the Verdict to be good. For they found the ſame date, &c. But your Queſtion to us is, Whether that Variance makes pluralities of Bonds. But for the matter of Variance, Davenport thought that it is material. In the Kings Bench it was one Parryes Caſe in an Obligation of 500 l. There it was quimpe pro quinque. And adjudged to be naught. Richardſon, I confeſs the Caſe in H. 6. where it is Wiginti for Viginti, and yet good. For there is ſome colour of likeneſs. But if the word be no latine word; So that nothing can be known what was intended; it is otherwiſe. So one Randalls Caſe, One was bound by theſe words, in quatuor centum libris. Whereupon it was doubted, Whether it was to be intended 400 l. or 104 l. And it was adjudged naught. Upon which it ſeemed to be naught here. And ſo ſeemed Hutton and Yelverton being only preſent.

Gammon againſt Malbarn.

IN an Aſſumpſit to pay 34 l. which accrew'd upon ſeveral promiſes, Firſt he ſurmiſed that one was indebted to him in 12 l. And that he would truſt him more; The Defendant came and prayed him to truſt him, and if he would, he would pay him the old debt. And whatſoever he ſhould be in arrear more, if it did not exceed 100 l. he would pay, and ſhews how he afterwards ſold to him divers pieces of Fleſh at reaſonable prices; And that he lent him 3 l. which he promiſed to pay. And then he came and requeſted him to pay the whole 34 l. But he would not pay the 19 l. for the price of Fleſh, nor the 12 l. &c. Henden moved in arreſt of Judgment (non Aſſumpſit being pleaded and found for the Plaintiff) becauſe that he does not allege before, That the Fleſh that he ſold amounted to the price of 19 l. And Secondly, becauſe that he makes but one Requeſt for the ſeveral Debts, where it ought to have been ſeveral, &c. Hutton and Yelverton thought all good. For the firſt, Becauſe that he refuſed to pay the 19 l. pro pretio, &c. But it had been better if he had alleged; That the Fleſh amounted to ſuch a price. But for the Demand, that it was ſufficiently made. And adjourned, &c.

Benſon againſt Sankeridge.

IN an Aſsumpſit upon an Inſimul computaverint, The Plaintiff declares, That he accounted for divers ſums of mony to him due; And that the Defendant was found in arrear as much as he aſſumed to pay; And does not expreſs for what the ſums were due; And by Richardſon, therfore naught. For ſuch an account for debt upon an Obligation in ſpecialty it is void, &c. Hutton If he declared, That the Defendant being

ſing indebted in diverſis denariorum ſumm's, aſſumed; it is void, without ſhewing for what. But here the action is grounded upon the Account. Richardſon, It ought to be expreſſed in general, the debts were for Wares ſold, &c. But otherwiſe if the Account was for debt upon an Obligation or ſpecialty, he recovers double. For the ſpecialty remains notwithſtanding the recovery in the Aſſumpſit. Hutton, We cannot think that it is for any thing, but ſuch things which lye in account. Which Harvey agreed. But the Court commanded to ſearch Preſidents. Paſc. 4 Car. Com. Banc.

Holford againſt Gibbes.

HOlford brought an Action upon the Caſe againſt Gibbes and his wife, who was Adminiſtratrix, upon a promiſe of the Inteſtate, which appears in the Declaration, that it was 16 years ſince the promiſe made. And Sir Thomas Crew prayed to be diſcharged of the Declaration upon the Statute of 21 Iac. cap. 16. But the Court would not diſcharge him without pleading or demurrer. But it was agreed, That if upon the ſhewing of the Plaintiff himſelf, the Action appears to be out of the Statute of Limitations; Then the Defendant ought to plead the Statute, And he ſhall be aided by the averment. Richardſon, If the Defendant pleads non Aſſumpſit, and the verdict finds that the Action grew out of the time of Limitation: whether it ſhall be aided by a ſpecial Verdict. Crook ſaid, Yea. But Yelverton ſeemd not; For it is not pertaining to the Iſſue.

Ganſords Caſe.

ONe Ganſord was bound in an Obligation of 200 l. to Char. Rogers, to pay him 100 l. But that was in truſt to the uſe of Mary Watkins, during her life, and after to George Powell. Powell cannot releaſe that bond, neither in Law nor Equity, during the life of the Wife. For then it deſtroys the uſe to the Wife; As it was agreed. But if it was to her benefit ſolely, The Releaſe is good in Equity.

Woolmerſtons Caſe.

ONe libells againſt Woolmerſton for the herbage of young Cattel, (ſcil.) for a penny for every one. And Hitcham moved for a Prohibition; And ſaid that he ought not to have Tithes, If they are young Beaſts brought up for the Cart or Plough. And ſo it hath been adjudged. As if a Parſon preſcribe to have Tithes for hedgeing ſtuff, he cannot. Becauſe that he preſerves the Land out of which he had Tithes. And then a Parſon libells for Tithes of an Orchard, for that that it was a young Orchard. And the Cuſtome of the place was, to pay 4 d. for an Orchard. Hitcham ſaid, There is not any ſuch difference between old and new Orchards. For if the Cuſtome be that he ſhall pay 4 d. for every Orchard, It will reach to the new Orchard. And then he libells for a Harth-penny, for the Wood burnt in his Houſe. Hutton ſaid, the Harth-penny &c. is more doubtfull. For it is a Cuſtome in the North parts to give an Harth-penny for Eſtovers burnt. For which he preſcribes to be free of every thing which comes to the Fire. And in ſome parts by the Cuſtome they had paſturage for the Tenth Beaſt, or the tenth part of the Gains which is barrain for the time. But he and Yelverton who only were preſent, That no Tithes are due for them without Cuſtome. Hitcham, they alſo will have Tithes for a thing before it comes

Paſc. 4 Car. Com. Banc.

comes to perfection, which would be tithable afterwards. But I agree, If he ſells them before they come to perfection, then the Parſon will have tithes. But by Hutton and Yelverton, There may be a Cuſtom to have every year a penny for them. Sed adjournatur, &c.

Viner againſt Eaton.

VIner againſt Eaton, Where a Sute was between them in the Spiritual Court, for ſtriking in the Church, which by the ſecond branch of the Statute of 5 E. 6. cap. 4. It is excommunication ipſo facto. By which he ſurmiſed him incidiſſe in pœnam excommunicationis. And being granted it, &c. And Aſhley ſhew'd cauſe why it ſhould not iſſue. (viz.) There ought to be a Declaration in the Chriſtian Court of the Excommunication: before any man prohibit him the Church. Richardſon ſaid, That their proceedings are not contrary to the Statute. But ſtood with the Statute. And it was ſaid by Yelverton. It is ſeen that there ought to be a Declaration in the Spiritual Court. But the difference is, where it is officium Judicii or ad inſtantiam partis, they will give coſts, which ought not to be. Hutton and Richardſon, If the party will not follow it, none will take notice of it. And they proceed to give coſts. Then a Prohibition may be granted. And if he be a Miniſter he ought to be ſuſpended for an offence againſt that Statute. And it ought to be firſt declared, and ſo to excommunication. And that cannot be pleaded if it be not under Seal. Dyer 275. And after all, theſe were agreed by the Court, and no Prohibition was granted.

Fox againſt Vaughan and Hall.

SIr Charles Fox was Plaintiff in a Replevin againſt Sir George Vaughan, and Iacob Hall, for taking of his Beaſts in Ruſtock, The Defendant was known as Bayliff of Tho. Vaughan at the day quod William Vaughan was ſeiſed of the place, quo, &c. And being ſeiſed the 9th of Maii, 10 Iac. by Indenture granted to Thomas Vaughan a Rent of twenty Nobles per annum out of the place in quo, &c. to commence after the death of Anne Vaugham, for life, payable at the Feaſts of St. Michael, and the Annunciation. And if the Rent be in Arrear at any day of payment, or fourteen daies after the demand at a place out of the Land, ſcil. his Capital Meſſuage in Orleton; Then it ſhould be lawfull for him to diſtrein; And he ſhews that twenty Marks were in arrear. And that 23 Iac. 22 Octob. he demands it at Orleton, &c. And the Plea in Bar was, That the Grantor was not compos mentis at the time. Upon which Iſſue was taken. But it appeared upon the evidence that at the time of the Grant Gaudebat lucido intervallo. Whereupon it was found for the Defendant. And Sergeant Barkley moved in arreſt of Judgement; For that the Demand appears to be after the 14 daies. And he took a difference where the Demand ought to be made upon the Land, But there it may be demanded at any time. And the Diſtreſs it ſelf is a Demand. As it was adjudged 20 Iac. in Skinners Caſe. But otherwiſe it ought to be out of the Land. Henden objected, becauſe the Iſſue was joyned, That cannot be ſhewed. Richardſon, Although there was Iſſue joyned; yet it appears that you cannot diſtrein without demand: if there be not actual demand of the Diſtreſs alleged; It is illegal. And for the matter he cited Maunds Caſe, 7 Rep. 28. And he doubted if ſuch a difference would hold. Berkley, This difference was taken by me before cited. But lecto recordo the Demand is not ex tunc petito. But if it be in arrear, and required at the Capital Meſſuage, upon which

which he demanded, it does not refer to any place. Richardſon, If there be a nomine pœnæ, then it ought to be demanded ſtrictly at a day. And when it is to be demanded upon the Land, it may be at any time. For that, that Littleton ſayes, That a Tenant is intended alwaies preſent upon the Land; But when the Demand is to be made at another day, it is only to give notice, and ſo it is demandable upon the Land. Hutton, by that expoſition if he does not hit the demand upon the day, he ſhall loſe his Rent. Richardſon, He had loſt his Diſtreſs by that day only, but not his Rent; For if he demand it after upon the Land, he may have an Aſsiſe. Hutton, you would make that partly a Rent-ſeck, and partly a Rent-charge. Harvey, If the Rent be not gone, but that he may have an aſsiſe. Richardſon, It is a Rent-charge generally by the clauſe of the diſtreſs. And for that he may have an Aſsiſe, which is a remedy for a Rent-charge as well as a Diſtreſs. Hutton, If you may make it a Rent-ſeck, you have loſt the Rent-charge for ever. If a Grantee of a Rent-charge or Rent-ſeck brought an annuity. Richardſon. If he proceed to Declaration he had loſt the Rent-charge. Et adjournatur.

Weſt. 4 Car. com. Banc.

Note, It was ſaid, if one comming upon an Attachment in any Court; And the other does not put in Interogatories againſt him, he ſhall be diſmiſſed with coſts, and may appear gratis if he will.

Warner againſt Barret.

Elizabeth Warner libells for a Legacy in the Spiritual Court againſt one Barret, who moves for a Prohibition. Becauſe he had there pleaded plene adminiſt. and proved that, by one Witneſs, and they would not allow it. Richardſon, before the Statute of E. 6. The proper Jure for Tithes was there, and they allow one Witneſs to prove payment; a Prohibition ſhall be granted. And he put Morris & Earons Caſe in the Biſhop of Wincheſters Caſe. Where it was ruled, if the Spiritual Court will not allow that plea which is good in our Law, a Prohibition ſhall be granted, as in Caſe of Tithes. And he ſaid that the Caſe of a Legacy is all one. Crook, When one comes to diſcharge a thing by due matter of Law, and proves it by one Witneſs, If it be not allowed, no Prohibition ſhall be granted there. Richardſon, Our Caſe is proof of plene. Adminiſt. pleaded, which goes in diſcharge. But if there be enough pleaded, which goes in diſcharge, and proves that by one Witneſs, and not allowed; A Prohibition ſhall be granted. Hutton ſaid, that properly for a Legacy the ſute is in the Eccleſiaſtical Court, although they may ſue in the Chancery for it; yet the proper Court is the Eccleſiaſtical Court: And they ſaid, they uſed to allow one Witneſs with other good circumſtantial proofs. If they be not in ſome criminal Cauſes, where of neceſsity there muſt be two Witneſſes. In one Hawkins Caſe. Farm or of a Propriation, libells for Tithes of Lambs for ſeven years: And there he proved payment by one Witneſs; and a Prohibition was granted for not allowance. Yelverton, There may be a difference where the Jure is meerly Eccleſiaſticall for a ſum of mony; as for a Legacy there the payment of the legacy is of the nature of the thing. And the Eccleſiaſtical Court ſhall have Juriſdiction of the proof and matter. But if one gives a legacy of 20 Oxen; And the other pleads payment of as much mony in ſatisfaction, there they cannot proceed, but upon Common law; For that that the legacy is altered. And if a proof of one Witneſs is not accepted, a Prohibition ſhall be granted. For now it is a legal Tryall. 35 H. 6 If the principal is proper for their Court, the acceſſory is of the ſame nature. Alſo the Jure is commenced for a Legacy: and the other pleads

Pasc. 4 Car. Com. Banc.

pleads plene adminiſt. There they proceed upon the Common law. For they ſometimes take that for Aſſets, which our Law does not take. It was adjudged in the Kings Bench, that a proof by one Witneſs of a Releaſe of a Legacy was diſallowed, a Prohibition ſhall be granted. Crook, In this Caſe a proof of ſetting out of Tithes by one Witneſs a Prohibition ſhall be granted.

Hawkeridge's Caſe.

IT was agreed by all in Hawkeridge's Caſe, That in a forcible entry or Treſpaſs brought againſt one; If the Defendant is found guilty by verdict, and before Judgement the Plaintiff releaſes to him; Becauſe that by that the Plaintiff is barred, The King is alſo barred of his Fine.

Falkners Caſe.

ATthow Sergeant ſaid, That if theſe words were wanting in a Deed, In cujus rei Teſtimon. That the Deed is not good; And he ſaid, that all Covenants, Grants, and Agreements which came after thoſe words in a Deed, are not of force, nor ſhall be pleaded as parcell of the Deed.

It was obſerved by the Court, That the Wife of a Duke, Earl, or Baron, in all writings they ſhall be named Ladies. But the Wives of Knights ſhall be named Dames.

And it was likewiſe obſerved, that if a Wife of a Duke, Earl, or Baron, takes a new Husband of a more baſe degree, That ſhe loſes her name of Dame or Lady, and ſhall be named in every Writ according to the degree of her Husband. As it happened in the Caſe of the Lady.

Johnſons Caſe.

IT was ſaid, if a Parſon leaſes his Rectory for years, or parcel of his Glebe, reſerving a Rent, and dies, his Succeſſor accepts the Rent. That acceptance does not make the Leaſe good. Becauſe by his death the Franktenement is in abeyance, and in no Man. And alſo a Parſon cannot diſcontinue. And by conſequence, That that he did without Livery is determined by his death. And it is not like to the Caſe of an Abbot, Prior, or Tenent in tayl.

Joyce Norton and Thomas Ducket againſt Harmer.

JOyce Norton and Thomas Ducket Plaintiffs againſt George Harmer the Vicar of, &c. In a Prohibition, the Libel was for Wood imployed in Hedging, and for Fire-wood. Iſſue was joyned, that there was in the Parish a great quantity of Land incloſed; And that they uſed to take Wood for Hedge-boot and Fire-boot, and they were diſcharged of Tithes, in conſideration that he payed Tithes in kind of Hay and Corn, &c. And it was found for the Defendant. Crowley moved, That a Conſultation cannot be granted, for that that they ought to be acquitted of Tithes for thoſe of Common right. And for that although preſcription was alleged, it is nothing to the purpoſe. Atthowe, For Fire-wood it was proved that Tithes allwaies were paid. Richardſon, There is

no

no doubt but the diſcharge alſo ought to be by Cuſtome, and to be grounded upon modus decimandi. Yelverton and Crook otherwiſe, that it is not upon modus decimandi, But by the Common law. And the reaſon is, for that, that when a man is Owner of arable Land, and he pay the milk and Corn; And for that they are diſcharged of things conſumed in the Houſe; Which are to make Paſtures and Servants fit to manure the Land, &c. Richardſon ſaid, It is ſeen that it ſhall alwaies be diſcharged, in conſideration it is alleged, how a ſmall conſideration will ſerve. Crook, It is not modus decimandi, but the diſcharge is for that, that the Parſon for them had a benefit, for he had by them better means of Tithes. Hutton, If a man had an Houſe of Huſbandry, and demiſes all the Lands but the Houſe; He ſhall pay tithes for them abſumpt. in the Houſe. Crook not. No profit is made by them to the party; but the Parſon had a benefit by him. And a day was given to ſearch Preſidents. Paſc. 4 Car. com. Banc.

Bibble againſt Cunningham.

BIbble brought an Action upon the Caſe againſt Cunningham, and declares, That there was a Communication between him and the Defendant of the ſale of a Banck, and an acre of Land, And that in conſideration thereof, and that the Plaintiff would aſſure and deliver to the Defendant poſſeſſion of all the Banck aſſoon as he could; and that at all times upon requeſt to be made to the Plaintiff by the Defendant, the Plaintiff would become bound in a Statute Perchant to make the Aſſurance to the Defendant; The Defendant promiſed to pay to the Plaintiff 72 l. at the end of 3 years from Michaelmas next enſuing. And that in the mean time for the forbearance he would give after 8 l. in the 100l. and that he became bound in a Statute Perchant for the payment of 72 l. And he alleges that the Defendant did not become bound in the Statute; but that he himſelf delivered poſſeſſion as ſoon as he could. And upon non-aſſumpſit pleaded, it was found for the Plaintiff. And Atthowe moved in Arreſt of Judgement; It is not a good conſideration or promiſe. He ſaid that there was a Colloquium and an Agreement, and in Conſideration thereof, &c. That is not a good Conſideration. And the ſecond Conſideration that he delivered, &c. tam citius quam potuit; It is not good, for it is uncertain. For it may be a year, or two years, or a day after. And the other promiſe to pay 8 l. in the hundred deferendo diem, And there is not any deferring the day; for it is not ſhewn that it is due before, and that he ſhall be bound in a Statute, and that no ſum is expreſſed which is uncertain. Richardſon, There is a good Conſideration, and a good promiſe. There was an Agreement touching the ſale of a Banck, and an acre of Land: and take all alike, and that perfects the Agreement. And it is plain that the Agreement was for 72 l. and the delivery of the poſſeſſion, or making of aſſurance, is not any Conſideration. But the promiſe is all the Conſideration. And he might have omitted the averment of the delivery of the poſſeſſion. But there is a croſs and mutual promiſe upon which the Action might lye. As many times it had been adjudged in this Court, and in the Kings Bench. And for the words tam citius quam potuit, the Law appoints the time (ſcilicet) ſo ſoon as he can go & remove his goods & things out of the Houſe, &c. As in Caſe, where one ſels goods for mony the Vendee ſhall have for telling the mony. And ſo here at the moſt, till requeſt be made. And although it is not expreſſed in what ſum he ſhall be bound by the Statute, yet it appears, that it is for the payment of 72 l. And then the ſum ought to be double in which he is bound. As if one arbitrate that he pay 72 l. and enters into an Obligation for the payment of it. That ſhall be in the double ſum, In which

Caſe

Paſc. 4 Car. Com. Banc.

Caſe he ſaid, that he could ſhew ſeveral Judgements of it. Crook, If one promiſe to me divers things, ſome of which are certain; It is good. But alſo for the time of the delivery, there the Law adjudges of that; And the ſum of the Statute ſhall be double, as it had been ſaid. But for the Caſe of the Arbitrament, it is adjudged contrary, as 5 Salmons Caſe. And admit that it be uncertain, It is a reciprocal Aſſumpſit, and an Action will lye upon that. Hutton, If a promiſe to enter into an Obligation, there ought to be a reaſonable ſum, as the Caſe requires for it. And in this Caſe it being in a Statute, which is more penal than an Obligation, I conceive the ſame ſum of 72 l. will ſerve. And for the time of the delivery of the poſſeſſion; It ought to be in convenient time, or upon requeſt. As 2 H. 6. And the Law adjudges of the inconveniences of time. And although that he faile in the ſum of his promiſes, the end of his promiſe is good enough; and the other is not concluded by that Action. But he might allege other conſiderations, in actions brought by him. Yelverton, There is but one promiſe againſt another; And the ſum in the Statute ought to be the ſame ſum. As the Caſe where an Annuity is granted of 20 l. untill the Grantee be advanced to a benefice; That ought to be a benefice of the ſame value. But I doubt whether it ſhould be double. Harvey, It is there by way of promiſe. And then one promiſe is the conſideration of another, and there is no breach, for it ought to be upon requeſt. And then the Action being brought upon that ſide, the requeſt cannot be alleged; and one promiſe good againſt another. Then be the ſum what it will, ought the Defendant to be bound ſingle or double? The Aſſumpſit not being perform'd, all agreed that the Action well lies.

A Verdict againſt an Infant.

NOte that it was ſaid, If a verdict paſs againſt an Infant, and the Defendant dies after verdict, and it is ſhewn, Judgement ſhall not be given againſt him. For the Court does not give Judgement againſt a dead man: and that is matter apparent, and the other is doubtfull matter.

Forteſcue againſt Jobſon.

A man ſeiſed of certain Lands hath Iſſue two Sons, and deviſes one part of his Land, to the eldeſt Son, and his Heirs, and the reſidue to the youngeſt Son and his Heirs; And if both dye without Iſſue, that then it ſhall be ſold by his Executors, and dyes. The eldeſt Son dies without Iſſue. And the opinion of Hutton, That the Executors could not ſell any part before that both are dead. For the youngeſt Son hath an Eſtate tayl in Remainder, in the part of his eldeſt Brother. So that the Executors cannot ſell it; And if they do ſell it, yet that ſhall not prejudice the younger Brother; So long as he hath Heirs of his Body. Richardſon ſaid, That although that the eldeſt Son aliens, and after dies without Iſſue, That the Executors may make ſale. For that that no intereſt was given to them; But only an Authority to ſell the Lands.

Dickſons Caſe.

A Writ de partitione fac. againſt two, the one appears and grants the Partition, the other makes default. Hutton ſaid, a Writ ſhall iſſue to the Sheriff to make Partition, but ceſſet executio, untill the other comes; For Partition cannot be by Writ; but between the whole. Otherwiſe it is of Partition by agreement.

Roth-

Rothwells Caſe.

Paſc. 4 Car. com. Banc.

IF a Man makes a Leaſe for life, and the Leſſee for life makes a Leaſe for years, And afterwards purchaſes the reverſion, and dies within the Term, yet the Leaſe for years is determined; And the Heir in reverſion may ouſt him, and avoid. But if one will make a Leaſe for years where he had nothing, and afterwards purchaſes the Land; and the Leſſor dies; If that be by Deed indented; The Heir ſhall be eſtopped to avoid it. By Hutton, Crook, and Richardſon.

Sir Charles Foxes Caſe.

THe Caſe of Sir Charles Fox was now moved again by Henden. It was objected that there ought to be an expreſs demand at the day, or otherwiſe he ought not to diſtreyn.

But firſt it appears, that he had a good Title to the Rent, then there being a verdict found, he ought to have Judgement upon the Statute. But not admit that; yet the Demand is good; for the words are legitime petit. and no time expreſſed. And although the Demand is after the day, yet it is ſufficient for all the arrerages, for the words are tunc et ibidem, but, &c. And the Difference is between the Demand which intitles to the Action, and to the thing it ſelf. Maunds Caſe, 7 Rep. 20. 40 Eliz. between Stanley and Read. Where it was agreed, That the day of the Demand cannot be made parcel of the Iſſue. 31 Eliz. rot. 1137. Com. Banc. Dennis & Varneys Caſe. There the Book was agreed. If it be to be demanded generally, it may be at any time, if it be tunc petit. otherwiſe. For otherwiſe it would be a Rent-charge at one time, and a Rent-ſeck at another. And the Diſtreſs it ſelf is the Demand; As it is in Lucas Caſe. If one be obliged to pay mony upon Demand; The Action brought is a ſufficient demand. And Barkley Sergeant. He ſhews in the Avowry that ſuch a one was ſeiſed of 30 acres, and grants a Rent out of them and others, by the name of all his Lands in Ruſtock and Ollerton. For that he ſaid that Ollerton is not charged. Becauſe that it is not pleaded, that he was ſeiſed of that. But the whole Court on the contrary. And that it is an uſual manner of pleading. And that it ſhall be intended, that he was ſeiſed of Ollerton. Firſt the words are per ſcriptum, &c. he granted a Rent, and then he pleads, that per ſcriptum ſuum, he gave a power to diſtreyn; And then it ſhall be taken that it was not made by any other Deed; and the Diſtreſs given by the ſecond Deed, ſhall not make the Rent a Rent-charge. And he cited Buts Caſe. Then if it be a Rent-ſeck, and the Diſtreſs gives a nomine pœnæ, There ought to be an actual Demand, and that upon the day; as it appears by Maunds Caſe. And Pilkintons Caſe, 5 Rep. & 5 Eliz. Dyer. If it was a Rent-charge, the Diſtreſs it ſelf ſerves for a Demand; As it was many times adjudged.

Secondly; The words are, If the Rent be in arrear, any day of payment, or 14 dates after. The laſt inſtant of the 14th day is the legal time for demand of it. And the words exiſtent. legitime petit. ought to refer to the dates expreſſed immediately before. As 39 H. 6. A man obliges, that his Feoffees ſhall do ſuch an Act, ſi qui ſuerunt. Thoſe words ſhall have reference to the Feoffees. And Dockwrays Caſe, If a Man be obliged that his Children, which he now hath, ſo alſo exiſtent. Being words of the Preſent tence, refer to the days now mentioned: and otherwiſe there would be a great inconvenience. For it cannot be intended the ſame tenant to be alwaies upon the Land. Barrows Caſe, 29 Eliz. A Feoff-

Paſc. 4 Car. Com. Banc.

ment upon Condition to re-enfeoff upon demand at ſuch a place. It cannot be demanded without notice to the Feoffee; For that that he ſhall not be compelled to be there alwaies expecting. And the ſame inconveniences alwaies would follow, If the demand ſhould not be upon the day of payment, by which, &c. Richardſon, If the Rent had been granted out of 20 acres in Ruſtock, and then he had granted by another Deed, that he ſhould diſtreyn in other Lands, being in the ſame County or not, and is the ſame, That that is but a Rent-ſeck. 10 Aſſiſe. 21 Aſſ. And the Diſtreſs is not but a penalty. And if that Rent is granted by one Deed, and the diſtreſs upon the Land by another Deed, If it be not delivered at the ſame time, then there ſhall be a Rent-charge, and there ſhall be alſo a Rent-ſeck. And when alſo it is ſaid, that ulterius he grants per ſcriptum ſuum, and does not ſay prædict. It ſhall be intended another Deed then, without averment, that it was delivered at the ſame time, It ſhall be intended at another time. But admit that it be a Rent-charge, and that it iſſue out of Ollerton where the demand of it was; Yet he ought to maintain that actually. In Maunds Caſe. The diſtreſs is a ſufficient demand; For it is not but to inable him to diſtreyn, and that is where the demand is limitted generally. But if a Rent be granted, and if it be demanded of the perſon of the Grantor, he may diſtreyn; Then there may be an actual demand, that was adjudged. As in the Court, 15 Jac. Com. Banc. Jackſon and Langfords Caſe, and in one Armerys Caſe. And in another upon the ſame point. So if you will grant a Rent-charge demandable at a ſpecial and particular place; If it was at another place than the Land charged, Without doubt there ought to be an actual demand. So if it be upon a ſpecial place from the Land charged or demanded; for the diſtreſs ought to be purſued as the Grant is. And that is upon ſuch a demand. But where it is reſtrained by the words of the Grant. And the ſame Law is where you will limit the time of the demand; If the Rent be granted payable at ſuch a day, and grants over that ad tunc being demanded; there a legal and general demand will not ſerve; But there ought to be an actual demand; And alſo it is as much although not in expreſs words; for the ſence and meaning carries it. If it be arrear at ſuch a day exiſtent. petit. The demand ought to be at the day mentioned before. If I be bound in Obligation, the Condition to pay mony at ſuch a day, being demanded; There ought to be a demand at the day of payment, or there ſhall not be a forfeiture. And now then there is not a demand at the time, ſo no cauſe of diſtreſs. And although the Verdict be found, if it be collateral matter, yet it will not help. For when it appears upon the whole matter, that there is not any Title to diſtreyn; the Tryall will not help it. And ſo Judgement ſhall be given for the Plaintiff. Hutton, Harvy and Yelverton agreed, That if it was a Rent-ſeck, and the diſtreſs a penalty, there ought to be an actuall demand at the time limited. But in caſe of a Rent-charge, although the demand is limited to be made upon parcell, Yet they all held, that a generall demand will ſerve; And that ſhall be at any place, at any time. For Harvey ſaid, There is no odds whether it is limited to be demanded generally, or to be demanded upon Dale. If it be material, it ought to be obſerved in the one Caſe as well as in the other.

Stan-

Stanleys Caſe.

Paſc. 4 Car. Com. Banc

IN one Stanleys Caſe, in an Action of Battery, Sir Thomas Crew moved for mitigating the dammages; Where the Judgement was given upon a non ſum informatus, and afterwards a Writ of enquiry of dammages. But the Court ſaid, That in ſuch Caſes they never will alter the dammages. And Crook ſaid, that he was once of Councel in an Action of Treſpaſs pedibus ambulando in the Kings Bench in ſuch a Caſe, upon a Writ of enquiry of dammages, 10 l. was given. That he could never have a mitigation by the Court, &c.

Outlary.

NOte, it was ſaid, That an Outlary in the ſame term for error may be reverſed in the Common Bench; Or in any term, if it be void upon any Statute. As for want of Proclamations, &c. And an Outlary was reverſed for that the Writ was præcipimus tibi where it ſhould have been vobis to the Sheriffs of London.

Gammons Caſe before.

IT was now moved again, And the Court was of the ſame opinion. For take the ſale for a reaſonable price, and the Concluſion alike, and by that the price appears. And although he ſaid 191. he might have found leſs.

Secondly the Requeſt ſhewen in the end ſhall be referred to all the particular ſums reſervando ſingula ſingulis. And Harvey ſaid, He was of Councel in the Kings Bench, Where the Writ was pro diverſis barrells of Bear. And in his Declaration he ſhewes, that at one day he delivered one, and at an other day another. And it was ruled, that the Declaration well maintained the Writ.

Thornills Caſe.

A Parſon libels for the tithes of young Cattel preſerved for the Cart. And the Queſtion was as before, Whether in ſuch Caſes a Cuſtome ought to be ſurmiſed. And Crook, Fitz-Herberts nat. brev. is, That of right Tithes ſhall not be paid for ſuch things. Richardſon, In all ſuch Caſes the Parſon ought not to have Tithes, if there be not a Cuſtome alleged, by which the Parſon had any thing, or recompence, or by which his other Tithe is better. And he ſaid, that he had ſearched the Books, and the Book of Entries, And there is not any ſuch Caſe, but ſome ſurmiſe is made, as for that, that he had tithe of Corn in ſpecie where the Land is incloſed; And ſo the Corn better. Hutton, It ought to be tryed if the thing in his nature be tithable, or if there be any uſage to diſcharge it or not, as the Cattel are in their nature titheable, then you cannot prohibit it; But the uſage ought to be ſurmiſed ſo. And it may be Law, as the Parſon had better tithes. Harvey, If a Libell be for tithes of Hedgeing and Fenceing; there a ſurmiſe ought to be made to diſcharge that. But when it is for tithes of Heyſars, which in apparency ought to be ſpared by the Law of the Land, Otherwiſe it is, &c. Richardſon, For the herbage of thoſe Heyſars, tithe is due by the Eccleſiaſticall law. And we never can take tithe of them without expreſs cuſtome or other recompence. Harvey, There was a Caſe 16 Jac. Com. Banc. A Parſon ſues for the herbage of Horſes, and the other alleged, that he kept them for the carrying of Coals. There he ought to ſurmiſe ſomething to be

Paſc. 4 Car. Com. Banc.

diſcharged; And if he allege that he kept them in his houſe for ſerving of Husbandry; the other may allege that he kept them to carry Coals, and the allegation is traverſable. Richardſon, There was a caſe, where the queſtion was, A Husbandman keeps an Horſe to ride up and down about his buſineſs; whether he ſhall pay for the herbage of him. And a prohibition in that caſe was granted; But a ſurmiſe ought to be made. Crook ſaid, that in the Kings Bench he had 20 times ſeen a prohibition granted in ſuch caſes, without any ſurmiſe. And a libel is for dry Cattel; If it be alleged that they are kept for the Plough, the other may allege that he keeps them to ſell, without that, that he keeps them for the plough. And before there is any profit of them, it is not reaſon they ſhould be tithable, and the Parſon ſhall have the benefit for them after. And for hedging it is lex terræ that he ſhall pay no tithes. Richardſon, It is lex terræ ne conſuetudo loci facit legem terræ. And if he had uſed to pay tithes for the Cattel or for hedging, he ought not to pay that ſtill. If an ignorant man will pay tithes for thoſe things, and after upon a libell a prohibition is granted; if the other does not allege a cuſtom, the prohibition ſhall ſtand; or if they allege a cuſtom, which is found againſt him, no conſultation ſhall be granted And for a Garden penny, the reaſon of that is apparent: for otherwiſe tithes ſhall be paid in ſpecie: And ſo for Hearth-penny, if he had always paid it, it ought to be paid. Hutton, If a man had an antient garden for which he paid a penny, and that is inlarged, of that inlargement tithes ought to be paid in ſpecie.

Rowe and Dewbancks Caſe.

IN a prohibition for ſlanderous words. Brampſton ſhewed cauſe why a prohibition ſhould not iſſue. The words were, That one Harvey and Rowe ſhould report that Mary Marrian ſhould ſay that Dewbanck and one Anne Rowe were together in ſuch a ones houſe, in an upper Room, and that the bed there was tumbled; And reported that ſhe ſaid, a pox of all Whores and Bawds; And that the Husband of Anne Rowe came to demand his wife at the houſe, and they denyed her to be there; And that after they were both ſeen to goe out of a Broomy field, and that one ſhould wiſh he had been in a tree to have ſeen what they did. And he ſaid, that a prohibition ſhall not be granted; for that theſe words may have dubious interpretations; for they may be ſpoken in mirth, or in heat, as well as to defame: But when other words are joyned with them, they ſhall not be granted. And theſe words ſo cannot be taken, but that they were adviſedly ſpoken to ſlander. As in Ayliffs caſe before, when it is added, that he lay with ſuch a woman, a prohibition ſhall not be granted. Richardſon. Theſe things are requiſite in every action, for words.

Firſt, That the parties of whom the words are ſpoken be certain.

Secondly, that the words tend to ſlander. By imputing a direct offence, that ſhould not be puniſhable; there now there may be a great familiarity, and no hurt done. And he is not directly charged with any offence, as it was in Ayliffes caſe; wherefore it was ruled that a prohibition ſhould iſſue.

Eaton againſt Ayliffe.

EAton libells againſt Ayliffe, pretending that a ſeat that the other claimed always, belonged to his houſe, and ſentence in the ſpiritual Court was given againſt Eaton, and coſts pro falſo clamore. And he appealed to the Arches, and there when they were ready to affirm the ſentence, he prayed a prohibition. And it was moved by Davenport, that it might be granted; and he cited one Treſhams caſe 33 Eliz. Where

in

in ſuch a caſe a prohibition was granted after an appeal. Richardſon, There is no cauſe for any prohibition, but in reſpect of the coſts. Hutton ſaid it was a double vexation, and the party ſhall not have coſts for that. Hitcham ſaid they came too late to have a prohibition for the coſts. Richardſon, That is not like to the probate of a Will, where a thing may fall out tryable at the Common Law. But there the principal was tryable at the Common Law, for they had it as in right. Hutton, Seats in the generalty is in the power of the Ordinary to diſpoſe: It is the preſcription which makes that not tryable at the Common Law; And if preſcription be made there, and it is found, that he ſhall pay coſts. Richardſon, All diſturbances appertain alſo to them: If it be not upon the Statute of 5 E. 6. But if a title be made there by preſcription, it is merly coram non Judice; and if they cannot meddle with the principal, it is not reaſon that they ſhall tax coſts. And a prohibition was granted. *Paſc. 4 Car. com. Banc.*

Fawkner againſt Bradley.

FAwkner and others againſt Bradley. In falſe judgement given before the Sheriff of Berkſhire, Bradley brought a replevin againſt Fawkner, and the others; who commanded the Sheriff to deliver the goods, and ſummon the parties to appear. The parties being demanded at the day, they appeared, and then the Plaintiff declared, upon which it was proceeded to Judgement. And it was held to be naught; For that he declared before any appearance. But upon the default he might have an attachment, and a diſtreſſe inſuing.

Dame Sherleys Caſe.

DAme Sherley wife of Sir Henry Sherley ſued in the High Commiſſion Court for Alimony. And Hitcham moved for a prohibition. And ſaid that alimony is not within the juriſdiction of the high Commiſſion; For the Court of high Commiſſion is to try arduæ regni, which are not tryable by the Common law. Richardſon, The power of the high Commiſſion is not de arduis regni, but of hereſies, and of ſuch other things Eccleſiaſtical. And he ſaid that the Court of high Commiſſion, had ſpecial words in their Commiſſion, but not in the Statute of primo; and that the Statute de primo had no prerogative in that. And ſo the queſtion is, if the King may by the Common Law grant ſuch a Commiſſion. Hutton ſaid, that by the ſame reaſon as he may grant ſuch a Commiſſion; They may grant Commiſſions for all other things. Yelverton, I marvail how that came within their Commiſſion: he ſaid, that in tempore Iacobi, upon a debate before him, Sir Edward Cook ſo fully ſatisfied the King. And this matter of Alimony was commanded to be put out of their Commiſſion. And upon that Richardſon ſaid to Hitcham, Move this again when the Court is full, for we may adviſe of this; Et adjournat.

Lynne againſt Coningham.

LYnne againſt Coningham in an action upon the caſe, the matter was thus. An action of debt was brought by the Plaintiff, and he recovered, and had a capias ad ſatisfaciendum to take the party. The Sheriff arreſts him, and the Defendant made a reſcous. And in that if an action lies for the Plaintiff was the queſtion. And Ayliff ſaid, that the action did not lie againſt the party who made the reſcous, but againſt the Sheriff. And he cited Fitzher. Nat. Brev. 16 E. 4. 3. where the difference is.

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Paſc. 4 Car. Com. Banc.

diſcharged; And if he allege that he kept them in his houſe for ſerving of Husbandry; the other may allege that he kept them to carry Coals, and the allegation is traverſable. Richardſon, There was a caſe, where the queſtion was, A Husbandman keeps an Horſe to ride up and down about his buſineſs; whether he ſhall pay for the herbage of him. And a prohibition in that caſe was granted; But a ſurmiſe ought to be made. Crook ſaid, that in the Kings Bench he had 20 times ſeen a prohibition granted in ſuch caſes, without any ſurmiſe. And a libel is for dry Cattel; If it be alleged that they are kept for the Plough, the other may allege that he keeps them to ſell, without that, that he keeps them for the plough. And before there is any profit of them, it is not reaſon they ſhould be tithable, and the Parſon ſhall have the benefit for them after. And for hedging it is lex terræ that he ſhall pay no tithes. Richardſon, It is lex terræ ne conſuetudo loci facit legem terræ. And if he had uſed to pay tithes for the Cattel or for hedging, he ought not to pay that ſtill. If an ignorant man will pay tithes for thoſe things, and after upon a libell a prohibition is granted; if the other does not allege a cuſtom, the prohibition ſhall ſtand; or if they allege a cuſtom, which is found againſt him, no conſultation ſhall be granted And for a Garden penny, the reaſon of that is apparent: for otherwiſe tithes ſhall be paid in ſpecie: And ſo for Hearth-penny, if he had always paid it, it ought to be paid. Hutton, If a man had an antient garden for which he paid a penny, and that is inlarged, of that inlargement tithes ought to be paid in ſpecie.

Rowe and Dewbancks Caſe.

IN a prohibition for ſlanderous words. Brampſton ſhewed cauſe why a prohibition ſhould not iſſue. The words were, That one Harvey and Rowe ſhould report that Mary Marrian ſhould ſay that Dewbanck and one Anne Rowe were together in ſuch a ones houſe, in an upper Room, and that the bed there was tumbled; And reported that ſhe ſaid, a pox of all Whores and Bawds; And that the Husband of Anne Rowe came to demand his wife at the houſe, and they denyed her to be there; And that after they were both ſeen to goe out of a Broomy field, and that one ſhould wiſh he had been in a tree to have ſeen what they did. And he ſaid, that a prohibition ſhall not be granted; for that theſe words may have dubious interpretations; for they may be ſpoken in mirth, or in heat, as well as to defame: But when other words are joyned with them, they ſhall not be granted. And theſe words ſo cannot be taken, but that they were adviſedly ſpoken to ſlander. As in Ayliffs caſe before, when it is added, that he lay with ſuch a woman, a prohibition ſhall not be granted. Richardſon. Theſe things are requiſite in every action, for words.

Firſt, That the parties of whom the words are ſpoken be certain.

Secondly, that the words tend to ſlander. By imputing a direct offence, that ſhould not be puniſhable; there now there may be a great familiarity, and no hurt done. And he is not directly charged with any offence, as it was in Ayliffes caſe; wherefore it was ruled that a prohibition ſhould iſſue.

Eaton againſt Ayliffe.

EAton libells againſt Ayliffe, pretending that a ſeat that the other claimed always, belonged to his houſe, and ſentence in the ſpiritual Court was given againſt Eaton, and coſts pro falſo clamore. And he appealed to the Arches, and there when they were ready to affirm the ſentence, he prayed a prohibition. And it was moved by Davenport, that it might be granted; and he cited one Treſhams caſe 33 Eliz. Where

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in ſuch a caſe a prohibition was granted after an appeal. Richardſon, There is no cauſe for any prohibition, but in reſpect of the coſts. Hutton ſaid it was a double vexation, and the party ſhall not have coſts for that. Hitcham ſaid they came too late to have a prohibition for the coſts. Richardſon, That is not like to the probate of a Will, where a thing may fall out tryable at the Common Law. But there the principal was tryable at the Common Law, for they had it as in right. Hutton, Seats in the generalty is in the power of the Ordinary to diſpoſe: It is the preſcription which makes that not tryable at the Common Law; And if preſcription be made there, and it is found, that he ſhall pay coſts. Richardſon, All diſturbances appertain alſo to them: If it be not upon the Statute of 5 E. 6. But if a title be made there by preſcription, it is meerly coram non Judice; and if they cannot meddle with the principal, it is not reaſon that they ſhall tax coſts. And a prohibition was granted. *Paſc. 4 Car. com. Banc.*

Fawkner againſt Bradley.

FAwkner and others againſt Bradley. In falſe judgement given before the Sheriff of Berkſhire, Bradley brought a replevin againſt Fawkner, and the others; who commanded the Sheriff to deliver the goods, and ſummon the parties to appear. The parties being demanded at the day, they appeared, and then the Plaintiff declared, upon which it was proceeded to Judgement. And it was held to be naught; For that he declared before any appearance. But upon the default he might have an attachment, and a diſtreſſe inſuing.

Dame Sherleys Caſe.

DAme Sherley wife of Sir Henry Sherley ſued in the High Commiſſion Court for Alimony. And Hitcham moved for a prohibition. And ſaid that alimony is not within the juriſdiction of the high Commiſſion; For the Court of high Commiſſion is to try ardua regni, which are not tryable by the Common law. Richardſon, The power of the high Commiſſion is not de arduis regni, but of hereſies, and of ſuch other things Eccleſiaſtical. And he ſaid that the Court of high Commiſſion, had ſpecial words in their Commiſſion, but not in the Statute of primo; and that the Statute de primo had no prerogative in that. And ſo the queſtion is, if the King may by the Common Law grant ſuch a Commiſſion. Hutton ſaid, that by the ſame reaſon as he may grant ſuch a Commiſſion; They may grant Commiſſions for all other things. Yelverton, I marvail how that came within their Commiſſion: he ſaid, that in tempore Iacobi, upon a debate before him, Sir Edward Cook ſo fully ſatisfied the King. And this matter of Alimony was commanded to be put out of their Commiſſion. And upon that Richardſon ſaid to Hitcham, Move this again when the Court is full, for we may adviſe of this; Et adjournat.

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If

Paſc. 4 Car. Com. Banc.

If an arreſt be made upon a mean proceſs, and a reſcous made, There the Sheriff is not reſponſable. Becauſe that the Plaintiff might continue his proceſſe againſt the Defendant. But if it be upon Execution after Judgement; Now an action does not lye againſt the party, but againſt the Sheriff: And if he had an action againſt the party, he ſhall have an action againſt the Sheriff alſo, and ſo twice ſatisfied. And the Sheriff ſhall have an action againſt the party, and ſo he ſhall be twice charged. Richardſon ſaid, That the action well lies for the Caſe in 16 E. 4. It is ſeen there, that it is doubted upon the mean proceſs execution, as to the reſcous, the party may have an action either againſt the Sheriff or the reſcouſſers. And in ſome caſes a man ſhall have his election of the actions, and both actions are but to recover damages. A man had an execution againſt one, He ſaw the man, and conveyed him out of his ſight, And it was adjudged that an action upon the caſe lies againſt him. And peradventure the Sheriff is dead, then he ſhould have no remedy, if he had not an action againſt the party, and no inconvenience follow; For he that will do ſuch a wrong, it is no matter if he be charged by both. If the Sheriff ſuffer one to eſcape, it is an eſcape as to the Sheriff; but the Plaintiff may have a new execution againſt the party if he will, as it was reſolved in this Court; but Hutton on the contrary, and that the action does not lie. As if a man be impriſoned, and an other help him out of priſon; yet an action will not lie againſt him by the Plaintiff: And the difference is good, where a man is arreſted upon a mean proceſſe, and reſcued, and afterwards becomes non ſolvend. ſo that they who reſcued him is the cauſe of the loſs of my debt; It is a wrong upon which he may be indicted. Yet the party ſhall not have a remedy againſt him, becauſe that he may proceed. And then he ſhould be the cauſe of multiplicity of actions. Yelverton was of the ſame opinion, and agreed that difference put before. And that there is no difference between this caſe, and the caſe put by Hutton. For a reſcous made half an hour after the arreſt is all one as if it were a year after. And Fitzherb. nat. brev. 102. ſatisfies me. Harvey on the contrary, He who was injured, the law gives him a remedy againſt the party who did the wrong. In the Kings Bench, the caſe how one came to take in execution by a fier. fac. the goods being in an houſe, and one ſeeing the Sheriff came and ſhut cloſe the door, and adjudged that an action upon the caſe lies againſt him. And there is no difference between our caſe and that, where one comes to make execution, and the other makes a reſcous. Richardſon in Greſhams caſe; Greſham was poſſeſſor of the glaſſe houſe at Black-fryars. Beresford was a Glaſs-maker, and had many glaſſes in Greſhams houſe. Seaman recovers in debt againſt Beresford, and coming to make Execution of thoſe glaſſes, Greſham ſtanding at his door, ſeeing them coming, and knowing their purpoſe, ſhut the doors. Seaman brought an action upon the caſe againſt him, and judgement was given for the Defendant, becauſe that the Sheriff never demanded the Key to open the houſe, 18 E. 2. If he had demanded the Key, it had been adjudged againſt Greſham. And there if an action upon the caſe will lie for hindring to make execution, a multo fortiori, when it is actually done, and then the party reſcued. And he denied the caſe put by Hutton, where one is reſcued out of priſon. And ſaid, if one be reſcued from the Bayliffs, the Sheriff ought to have the action. Hutton upon a mean proceſs, the Sheriff never had remedy for the reſcous, but he ſhall return the reſcous. But upon an execution, he ſhall not return the reſcous, but he ſhall have an action, and that the party is not prejudiced; for he ſhall have an action againſt the Sheriff, who in judgement of law is the party lyable. Crook, That the action will lie is a miſchief on both parts. The Defendant may be twice charged, and the Plaintiff may loſe his Debt. But I conceive the action well lies againſt him

him who made the reſcous, &c. And if the Sheriff brings the action he may plead the recovery by the Plaintiff; when the Sheriff makes his return of the reſcous, there is no remedy againſt him, as it was adjudged; And the difference is, that when he goes to make execution, it is at his peril if he does not take power enough with him, ſo that he may do it. And if the Gaol be broken, it is no excuſe for the Sheriff. Alſo if the party taken before he come to the Gaol is reſcued, there is no remedy againſt the executors of the Sheriff. If debt be brought againſt the Sheriff for an eſcape, and in that a recovery, the Plaintiff ſhall never take the party again: And ſo alſo if he brought an action againſt the party, and recovered, the Sheriff may plead that. And for the book in Fitzh. Nat. brev. cited, it remains doubtfull. Hutton, a Stranger commits waſte, and the Leſſee dies, yet no remedy againſt the party who committed the waſte; for the Leſſee is charged of waſte. And ſo alſo the Sheriff of an eſcape. But after, as it was told me by one who was preſent, Judgement was given for the Plaintiff. Paſc. 4 Car. Com. Banc.

Humbertons Caſe.

IT was ſaid by Richardſon, and agreed by Hutton, That a term evicted upon an Elegit is grantable; but upon a Statute Staple, or Merchant, not. And Richardſon ſaid, That Fillwoods caſe in the 4 rep. 66. if it be well obſerved, will prove that difference.

Iſham and Lawnes Caſe.

NOte, in evidence to the Jury in an Ejectione firm. between Iſham and Lawne, It was ſaid by Richardſon and Hutton, and by divers Serjeants at the bar, and not denyed by any, If a Son diſſeiſe his father, and levy a fine with proclamations to a Stranger: upon whom the Father enters and dies, The ſon may re-enter againſt his own fine.

Allen againſt Weſtley.

IN evidence to the Jury between Robert Allen, and Iſaac Weſtley, upon the 5. Eliz for perjury: Richardſon there remembred, that there was one charged with perjury, and it was layed; that one ſwore that he drew his dagger, and beat and wounded another; And it was found to be with a ſtaff; and it was agreed not to be perjury; for the beating was only material. It was one Styles's his caſe; and it was agreed by the Court in that caſe, that although a witneſs ſwears the truth; yet if it be not truth of his own knowledge, as if he ſhews how one revoked a will by paroll, in his hearing, when the words were ſpoken to another in his abſence, he does not ſwear truly, and it is a corrupt oath within the Statute. And it appears in the caſe in which this perjury was ſuppoſed to be committed, which was between Allen and Weſtley; alſo that theſe words were good words of revocation of a will. I utterly renounce and deteſt that Will, and will make a new one; But if they were, That Will ſhall not ſtand, I will make a new one, they are not; For the firſt ſhews a preſent purpoſe of revocation, the laſt a fortiori; but more afterwards.

Thomas and Kennis's Caſe before.

DAvenport argued for the Plaintiff. And the Queſtion here is, Whether there was any Eſtate in Edward and Walter ſetled at the time of the Fine levyed? Or their Eſtate was only in contingency? Becauſe that Richard was then living. For I agree, that if at the time of the Fine

Poſc. 4 Car. Com. Banc.

Fine levyed, Edward and Walter had not any Eſtate ſetled or veſted but all in contingency, That then the Fine deſtroyed all the Remainders. For it is clear when Tenant for life is, and the Remainder in contingency levy a Fine; That is a forfeiture; and deſtroys all the contingent Remainders. 1 Rep. 131. I hope that they will agree, that if there be an Eſtate ſetled in them, that Tenant for life levies that Fine; Although that they in the Remainder do not enter within 5 years after the death of Tenant, or after the eſtate eſcheated. And that was adjudged 21 Jac. Tooker & Lawns Caſe in the Kings Bench. But the Caſe was Mich. 33 & 34 Eliz. The Queſtion then is, whether Edward and Walter having any Eſtates ſetled in them, two Eſtates are ſo limited to them joyntly for their lives, ſo long as Richard and Anne ſhall have iſſue male of their bodies living.

Secondly, The Eſtate to them was to their own uſe, and that was not joyntly but ſucceſſive. And if any of thoſe uſes were in eſſe at that time of the Fine, then they fall out clearly with the Plaintiff. I conceive that both their Eſtates were in them. First, concerning the firſt Remainder limited to their joynt uſe, in which it is to be conſidered; Where the not ſetting forth of the Lands makes it contingent. It is a ſtrange Caſe. That if the directions for the ſetting out had been obſerved, that then there might have been a preſent Eſtate ſetled upon a ſubſequent Condition, and not upon a precedent Condition. Where it ought to be agreed, when the Indenture is made with a Covenant to levy a Fine, That no uſe will riſe before the Fine. Coment. 302. Then although ſome things ought to be done before the uſes will riſe. If thoſe things had been done, the uſe ought to be raiſed. For certum eſt quod certum reddi poteſt. 17 E. 4. 1. When contracts are upon incertainties, when the thing uncertain is become certain; when the Indenture was ſealed, that made a contingent uſe in the limitation, but when the thing had been done, it ſhall make a perfect uſe in the limitation. But now it is become impoſsible by the non-performance, &c. It had been urged that ſo there ſhall be a double contingent, which is concerning the Houſes, &c. I ſay there is a great difference, between a Collateral uſe which does not depend upon the other Eſtates, and an Eſtate limited in courſe of a Remainder. I agree, if they be contingent Remainders, the Fine will deſtroy and overthrow them: but if there be a collateral clauſe by which a uſe is limited; As if there be a Proviſo, that if ſuch mony be not payed, it ſhall be to ſuch an uſe; That contingent uſe is not deſtroyed by Fine. 1 Rep. 130, 134. Chidleys Caſe, where the difference is directly taken; If a Feoffment be made to the uſe of the Feoffee for life, with divers contingent Remainders over. If Tenant for life makes a Feoffment, all the contingent Remainders are deſtroyed. But where the contingent came in by a collateral Clauſe, and not by way of Remainder, otherwiſe it is. As a Feoffment to the uſe of a man and his wife, which ſhall be a Remainder over. That is a good uſe to the wife, and cannot be deſtroyed by feoffment. Dyer 274. and Bracebridges Caſe cited in Chudleys Caſe 133. It was adjudged accordingly. In the third branch here it is; If he dies, then ſhe ſhould have the Houſes during widowhood. But the courſe of the Remainder came in the fourth clauſe; And that had relation to the firſt. And as to the ſecond as it is ſhewn: that at the time of the limitation it was not the intent, that the Remainder ſhall be contingent to Edward and Walter. If I grant to a man, that if he marry my Daughter, he ſhall have my Manor of Dale for years, the mariage ought to be before he ſhall have any thing in the Manor. But if it had been, that he ſhould have had my Manor for 7 years, if he marry my Daughter; Then the mariage is conditional ſubſequent, that if he does not marry, I ſhall have my Manor again. 10 E. 3. 41. The Abbot of

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Boſneys. The difference is there put by Brerewood. 36 H. 6. An Annuity granted untill he was promoted to a benefice; That is conditional from the Defeaſance. But if it was, that the Grantée did such an Act, that he should have an Annuity. And ex vi termini there is a perfect Estate before the if, and the former if is well explained by the last; That if there be not issue male, then the Estate shall cease. 10 Rep. 41. A Condition in its nature is not to precede an Estate. As if the Lands be given to a woman for years, si tam diu vixerit. 35 Aſſiſe plo. 14. The Case in point of a Remainder, which comes to our Case, and conteyns both the parts of that difference. As it is in Colthurſts and Binſhams Case. The Prior and Covent of Bath leases Land for life, the Remainder to W. Si ipſe inhabitare et reſidens eſſe velit infra prædict. terram. And if it shall happen that the said W. should marry before H. Then the Remainder to P. And the Question is, whether it is a Condition precedent or subsequent. Resolved, that the second is precedent. For that, that the (Si) precedes, and for that makes the Estate contingent. But for the other (Si) after the Estate limited, Si ipſe inhabitare vellet, They were the very words of Mountague Chief Justice, It cannot be denyed but that it is subsequent, and then goes in Defeasance; and the other ought to shew the non-performance of it. And that Case is more strong than our Case is, For that Estate is by way of Livery, not by use. For in Case of Livery, there he ought to have a time to do the thing. And our Case then, he should have for life determinable upon the (Si) &c. And that construction of Uses shall be clear by the intent, which appears that there ought to be a present Estate; Where uses are by Indenture, if by one construction the Intent is frustrate; and if by another upheld, That ought to be taken ut res magis valeat, &c. The Lord Sturtons Case. Where a Lease was made of a Manor to two Hubbards, to have to them, and to two others for their lives: the first two dye. And it was ruled, that it was good but to the first two for their lives, and not for the lives of the four. Because they shall take but in point of Estate. See more after.

Trin. 4 Car. Com. Banc.

Termino Trin. 4 Car. Com. Banc.

The King againſt the Biſhop of Canterbury.

The King brought a Quare impedit againſt the Biſhop of Canterbury, Sir John Hall, and Richard Clark, for the Church of Marleborough in Northamptonshire. And declares that Richard White was seised of the Manor, to which the Advowson belonged. And the 6 Iac. by Indenture, he covenanted to stand seised to the use of himself and his wife for their lives, and to the Heirs of Richard White. And after White presents one Boynton, and dies, and his wife marries with Sir John Hall. The first of June 6th Iacob. by Deed grants proximam advocationem to two, to this intent, that he might receive of such a Parson, that he presented, all mony as should be agreed between Grantor and Grantee; And that this was done Boynton lying in extremis. And then the 26 Ian. 16 Iacob. there was a corrupt agreement between Sir John Hall and one of the Grantees, That for 200 l. to be paid by the Clark Blundell, That the other Grantee should present him. And the first of February Blundell pays Sir Richard the mony, and the second day he was presented, instituted, and

Trin. 4 Car. Com. Banc.

inducted accordingly. And that upon this it appertained to the King to preſent: The Biſhop pleads but as Ordinary: Sir John Hall makes a Title, and traverſes the corrupt agreement. The Incumbent pleads by Proteſtation that there was not any corrupt agreement, as it was alleged, and not anſwers whether the mony was paid or not; But that he is Parſon imparſonee of the preſentment of But 16 Iacob. after ſuch an agreement (ſcil.) 17 Feb. he was preſented by the Letters Patents of the King to this Church, and never anſwers to the Symony. And it was held by the Court to be naught, and only pleaded to hinder the Execution before the Juſtices of Aſsiſe, If the Tryal went againſt the Patron.

Upon a Prohibition.

ONe libells againſt another in the Spiritual Court for the tithe of two pecks of Apples, and for feeding the Cattel upon the Ground. And the Defendant for the Apples anſwered, That there were two Pecks only growing in his Orchard, and that they were ſtollen and never came to his uſe; and for the Cattel, that they were antient Pitch-beaſts, and that they growing old were dry: And that for a month they depaſtured with other Heyfars, and that after they put them in a Meadow, out of which the Hay was carried; And afterwards he fed them with hay in his Houſe. Atthowe, Becauſe that the Anſwers were not admitted, prayed a Prohibition. Hutton, If Appples are upon the Trees, and taken by a Stranger, ſhall the Parſon be hindred of his tithe? Yelverton. If I ſuffer one to pull my Apples the Parſon ſhall have tithes. But if they be taken by Perſons not known, the Parſon ſhall not have tithes of them; Which was granted. For they are not tithable before plucking. And for that if he ſuffer them to hang ſo long by negligence, after the time, that they are imbaſted, By Yelverton he ſhall pay tithes. For the ſecond matter it was agreed by the Court, and for the depaſturing in the Meadow, and for the Hay with which they were fedd, afterwards tithe ſhall not be paid. Becauſe that the Parſon had tithes of them before. But if the Queſtion is for the tithes when he went with the other Heyfars, By Crook, that is no cauſe to excuſe the tithe. Harvey, If I have ten Pitch-kine, which I purpoſe to reſerve for Calves, and they are dry, The Parſon ſhall not have tithe for their Paſture. But if I ſell them, by which it appears I kept them for fatting, There tithes ſhall be paid. Hutton agreed, That although that there was ſo ſmall time, yet when they went with the Heyfars he ſhall pay tithes for them.

Goddard and Tilers Caſe.

GOddard againſt Tiler in a Prohibition. Tiler ſued for tithes of Milk and Calves, upon which modus decimandi ſurmiſed. A Prohibition was granted (viz.) That every Inhabitant ſhould pay 4 d. for every Cow, and 2 d. for every Calf, which they proved that there was never tithe paid in ſpecie; But that every Inhabitant ſhould pay 6 d. and ſome 7 d. &c. And becauſe that that was not the proof of the ſuggeſtion, Atthow prayed a conſultation, and by the Court upon that reaſon it was granted: But it was agreed, that if the modus was alleged 20 s. and proved 40 s. it is good, becauſe it is but to intitle the Court to the juriſdiction; but in the principal caſe no modus is proved, for it is meer incertainty. Poſt afterwards.

Far-

Trin. 4 Car. com. Banc

Farrington againſt Kemarre.

FArrington brought an information againſt Kemarre upon the ſtatute of 32 H. 8. cap. 4. for ſelling of Beer for more than the Juſtices aſſeſt. And upon the iſſue of not-guilty joyned, he had a verdict found for him againſt the Defendant. Atthow moved in arreſt of Judgement, that the Court had not Juriſdiction; for that the Statute 21 Jacob. cap. 4. It is enacted, That all informations which may be before the Juſtices of peace, niſi prius, Aſsize, Gaol delivery, Oyer and Termíner, ſhall be before them, and not elſewhere. And he ſaid, that an information for this matter may be before the Juſtices of Peace, &c. But he argued upon the ſtatute of 33 H. 8. cap. 10. 17 H. 8. cap 11. that they may inquire of Vagabonds, &c. Victuals, and Victuallers, and Inneholders. So that the point is, whether it was an offence within the Statute of 33 H. 8. For if there be an Information, it is given by expreſs words. But that ſtatute does not ouſt the Juriſdiction of this Court; but the Subject had his Election, until the Statute of 21 Jac. which confirms ſuch Informations. So that the queſtion is, whether now Brewers be within the word Victuallers, or Beer within the word Victuals: And I conceive that beer is victuals, and Brewers are Victuallers; which I prove by common experience, and by another Statute. There is no Statute in England but make informations againſt Brewers, before the Juſtices of Peace; And they are all erroneous if they be not within the word Victuallers. For by 23 H. 8. A remedy is only given againſt them by an action of debt, bill, &c in which no protection, Eſſoyn, or wager of Law ſhall be allowed but at the Courts of Weſtminſter: Then they ought to be upon that Statute of 33 H. 8. And Lambert and Crompton are much deceived; For it is an article of their Charge to enquire of Brewers. But another ſtatute, (viz.) 2 E. 6. cap. 15. The Brewers are called Victuallers, The words are, If any Butchers, Brewers, Bakers, Poulterers, Cooks, Coſter-mongers, &c. conſpire to ſell their Victuals, &c. And what victuals ſhall be ſold by a Brewer but Beer? And there the whole Parliament were miſtaken if Brewers were not Victuallers: And for that he concludes, that becauſe that that offence at the making of 21 Jac. was puniſhable by Information before the Juſtices of the Peace. For that by this Statute this Court ſhall not have Juriſdiction. But Hitcham on the contrary. The Statute of 21 H. 8. ſays; That for offences of Brewers, they ſhall be inquired of by the Courts of the King; That it is meant the four Courts at Weſtminſter is clear. And when one Statute is made which confirms a ſute at the four Courts of Weſtminſter: yet if by a ſecond Statute you will alter that, you ought to have expreſs words: And if you bring that within the word Victual, you abrogate the Statute by general words, againſt the wiſdom of Parliament before, which provided that thoſe offences ſhould not be inquirable in the Country, and then the Statute of little force. Et loquendum ut Vulgus. It is improper to ſay, that a Brewer is a Victualler, for they are ſuch who ſell in ſpecie. And in the Country if it be inquired, whether it be an Alehouſe, or a Victualling houſe; It is ſaid that this is he who ſells victuals, which is for the ſuſtenance of a man, by the Statute of 2 E. 6. you will ſay a Brewer there to be a Victualler, for in every Statute the intention ought to be reſpected. For if it goes to Coſt ermongers, it is more clear in reaſon that Brewers ſhall be within that; and Corn and Beer are the chief things which conſerve a Commonwealth. And for that within. And the Statute extends to them for conſpiracy, for inhaunceing the prizes. For they take their Courts to be within the Courts of the King. For thoſe words were not explained until Gregories Caſe, Co. lib. 6. And being one time within their charge, they obſerve their old trade.

Trin. 4 Car. Com. Banc.

Henden argued and divided his matter into three parts.

First, He ſhewed how that Statute conſiſts upon the Statute upon 23. 33. 37 H. 8. And it is clear upon 23 H. 8. what informations ought to be in thoſe Courts, 7 Eliz. Dyer. 23. b. 37 H. 8. repeal 33. Only for a particular thing (viz.) of the time to enquire of thoſe Offences by the Juſtices, and makes them inquirable at the Seſſions.

Secondly, Whether the Statute 33. took this thing from 23 H. 8. And he thought it did not: Neither by the intention of the ſcope of the Act, nor by the words. First the intention of the Statute was not to inlarge the power of a Juſtice of Peace, but to provide that ſome things ſhould be duly executed. Which appears firſt by the Title, and then the Preamble. And if they have not particular Statutes, they cannot meddle with that by the general words: By which it follows, that they had not power for Victuallers. Now the 35 H. 8. cap. 3. provides that Victuals ſhall be ſold, and at what prices: then when that Statute of 33 H. 8. came within 8 years, certainly there was a reſpect to that; And the Statute before concerning Victualls only is, that Victuallers might retain Brewers. For to ſay generally, that Victuallers ſhould be Brewers, ſhall be abſurd. 8 Rep. Bonhams Caſe. A Brewer is a Trade, and may be intended under general words: But it ſhall be always ſecundum ſubjectam materiam. As ſome Statutes which puniſh the ſelling of Victuals at an unreaſonable rate, and Beer there is not Victual. And by 2 E. 6. cap. 15. There is not an expreſs name of a Brewer. Which imports, that it was not contained within the general word Victualler. 2 E. 3. 6. Where there is a Common price for certain things to be ſold at reaſonable prices; Where Brewers, &c. are named, 28 H. 8. Hoſtlers, Brewers, and other Victuallers, &c. Then theſe Statutes prove that you ought to have Brewers expreſly named; If you will have them taken as Victuallers. But (poſito) that Brewers are within the general words of 33 H. 8. yet the power of this Court is not taken away by the Statute of 21 Iac. In the Kings Bench. An Information was upon the Statute of Uſury, which was inquirable before the Juſtices of Peace, at the time of the making of 21 Iac. And the Queſtion was, Whether Informations are taken by 21 Iac. in Caſe of Uſury from the Courts of Weſtminſter. And adjudged that they were not. Becauſe that it is expreſly limited to thoſe Courts in a branch of the Statute of 37 H. 8. cap. 9. In one Foſters Caſe, 11 Rep. it is plain, that Affirmative words cannot take that from thoſe Courts at Weſtminſter: For thoſe are excepted by the Law; If this Statute extends to take the power given to another Law, you will repeal former Statutes without expreſs words. And there is a good rule, take 18 Eliz. Dyer 247. pl. 12. which ſee.

Thirdly, It ought to have been pleaded, For to deprive the Court of Juriſdiction; A motion does not ſtand with the intention of the Statute or the dignity of the Court. For, becauſe the Court had a general Juriſdiction, it cannot be ouſted of that without pleading upon 21 Eliz. Richardſon ſaid, that this Caſe is upon conſideration of 3 Statutes. 21 Jac. 23. & 13 H. 8. By the Statute of 21 Iac. Where the Juſtices of the Peace had ſome power upon Informations; There Courts at Weſtminſter are bound up. For that, he ſaid to Henden, That he did not well underſtand him in his ſecond point But he ſaid I hold; That if that Court only from the time of the making of 21 Iac. had power; Then it is clear, that it ſo remains now. But if this Court had the ſole power, Then the ſame Informations may be ſo either before the Juſtices of the Peace, or of Oyer and Terminer. Then the Juriſdiction of this Court is ouſted by 21 Iac. For the words are in that plain; It was not the inten-

intention of the Statute to inlarge the power of the Juſtices of Peace, but to confine thoſe things to them. So that here will be the Queſtion, whether the Juſtices of the Peace at the time of the making of 21 Iac. might take Informations againſt Brewers upon the Statute of 23 H. 8. before, to avoid the vexation of the Subject; That he ſhall not be lyable to the Information at Weſtminſter, and in the Country too. But that the Statute ought to favour; For when ſuch perſons were ſubject to many informations, they would be more afraid: So that all the queſtion will be upon the 33 H. 8. And admit that Beer-brewers are within that Statute; yet the juriſdiction of that Court continues before the 21 Iac. Then that conſtruction does not repeal the former Statute, as it was taken by Henden. But both may ſtand, and the Statute of 37 H. 8. alters only the ſix weeks ſeſſions, and gives the power at the general Seſſions; So the caſe may reſt merely upon the word Victuallers within 33 H. 8. Aſſe. 4 Car. Com. Banc.

Firſt then if they are within the words, which is proved by the Statute 23 E. 3. 4 H. 4. cap. 21. which Statute confounds Victuallers, and ſellers of Victuals, and 21 H. 8. cap. 17. which ſays preciſely, that Beer-brewers and Bakers which have been Victuallers. But whether they are Victuallers within the intention of the Statute, is the doubt. They may be within ſome Statute of Victuallers, and not within others. For if he brew their beer unwholſomely, he may be puniſh'd, but not by Information. And it was well obſerved that the words; That they ought to put in execution certain Laws, which ought to be intended, ſuch in which they had Juriſdiction before. It was ſaid that Brewers are not like to a Grazier, Butcher, or Miller, for they prepare that which is made Victuals by others; but beer is beer in the hands of the Brewer immediately, and nothing is done to it afterwards to make it more beer. But a Brewer although he be a victualler in general; yet not being particularly named, he is not within the power of a Juſtice of peace. Butcher, Fiſhmonger, and by the Statute of Rich. 2. Vintners are Victuallers, and are theſe within this Statute? Certainly not. But becauſe that Innholders are named, there ought to be other words; And there are Alehouſe-keepers and Cooks; For all ſellers of victuals are not within that Law, nor Brewer, nor Baker, which are particular trades of themſelves. And if it had been intended that they ſhould have been within the Statute, the Law would have named them. And Crompton and Lambert naming Brewers in their charge, is by the Common Law: For that, that for the unwholſomneſs of their Beer in their Aſsize, they are inquirable by preſentment. But by that it does not follow, that a Juſtice of peace may take information of them. Now the queſtion is upon 33 H. 8. In generality, Brewers are Victuallers. There is one Statute which enacts, that no Mayor ſhall be a Victualler, And afterwards there is another Statute made, that he may be a Mayor although he was a Victualler; So it was intended that they were Victuallers, for they prepared Victuals. But yet it is not within this Statute; for it appears by the preamble, that he is to enquire of things whereof they had power before, either by the Statute, or by the Common-Law; but it was not the intention to give them other authority. They may enquire of a combination in their prizes, and ſuch things; but not by information. Then when the Statute gives power to execute, it does not give power of new things, becauſe, &c. Harvey argued to the like purpoſe; but ſaid, that the Juriſdiction of theſe Courts ought to be preſerved as much as may. For the true execution of the Law is in theſe Courts. For in the Country, if an Informer inform againſt his neighbour, he will compound the matter, and ſo the King ſhall loſe his profit of the penal Laws. And ſo the Statute is made as a ſtalking horſe to help a friend. Crook, It is true that

Brew.

Trin. 4 Car. Com. Banc.

Brewers ſhall be conſtrued to be Victuallers ſecundum ſubjectam materiam, as the Statute is of ſhipping of victuals out of the Land. Beer ſhall be within that Statute. And he argued in omnibus, as before; Wherefore I doe not report it at large. But he ſaid that the Statute of 21 Jac. was upon the matter of all penal Statutes repealed; becauſe that it was ſo ill executed in the Country, And ſo Judgement was given for the Plaintiff.

Howſons Caſe.

A Libel was againſt Howſon the Vicar of Sturton in Nottinghamſhire in the high Commiſsion Court at York. Becauſe that he was not reſident, but lived at Doncaſter, and neglected to ſerve his cure; And that divers times he, when the high Court viſited, ſpoke ſo lowd, that he was offenſive to many, and being reproved for that, he gave a ſcornfull anſwer; And that there was one Wright in the Pariſh, who had a ſeat in the Church, and that the Vicar would ſpit in abundance in the ſeat, and that when Wright and his Wife were there. And that afterwards he ſaid with a common voice, That the Wife of Thomas Howſon was as good as the wife of Wright, And that in his Sermon he made jeſts, and ſaid, That Chriſt was laid in a Manger, becauſe he had no money to take up a Chamber, but that was the knavery of the Inne-keeper; he being then in contention with an Inn-keeper in the Pariſh, and that in divine ſervice he thruſt open the door of Wrights ſeat, and ſaid, that he and his wife would ſit there, in diſturbance of divine ſervice. And for that a prohibition was prayed and granted; for the high Commiſsion cannot puniſh non-reſidency, nor breaking the ſeat in divine ſervice: And the other were things for which he ſhall be bound to his good behaviour; and the complaint ought to be to the Ordinary, &c.

Hall and Blundells Caſe before.

Davenport ſaid, This Parſon being preſented by Simony, is diſabled to this Church for ever, and cannot be preſented to this Church again, although another avoidance: As it was adjudged in the Lord Windſors caſe. But it was ſaid by Richardſon, if he had ſaid abſque hoc, that he was in ex præſentatione of Sir George, it had been good. Which was granted. Henden, Two exceptions had been taken.

Firſt, that the Incumbent does not ſhew what eſtate or intereſt the King had to preſent him, which does not need, if the King brought a Quare impedit, then it is a good anſwer to ſay, That he is in of his preſenting. But if it be brought by a Stranger, then he ought to ſhew the title in his preſentment. And he alleged the Statute of 25 E. 3. Which inables the Incumbent to plead by writ of the Law. 41 Eliz. There was a Quare Impedit brought for the Church of Danel; A preſentation was pleaded by the King, without making a title, and it was admitted good. And in many caſes it is more ſafe not to make a title.

Secondly, Becauſe that he pleaded a preſentation by the King he is diſabled; As to that he ſaid, that before he be convicted of Symony, he may be preſented. But by Crook in Sathers Caſe, That if he be preſented before conviction, yet it is a void preſentment. And it was ſo agreed by the Court, and they reſolved the plea was naught, becauſe he anſwers nothing to the Symony; for the proteſtation is not any Anſwer: Wherefore Judgement was given for the Plaintiff.

Denne

Trin. 4 Car. com. Banc.

1 Go. 225

Denne againſt Burrough.

DEnne againſt Burrough, alias Spark, in a prohibition it was agreed by Yelverton and Crook, the other Juſtices being abſent, If a man makes his will, and makes his wife Executrix, and deviſes the reſidue of his goods after debts and legacies payed to his Executrix; His wife dies before probate, that now becauſe that the Executor had election to have them, and dies before he did ſo All the Goods belong to the Adminiſtrator of the firſt Teſtator, But otherwiſe by Henden, If there was a Legacy of a particular thing. Quære what difference.

Newton againſt Sutton.

RIchard Newton and James Elliot againſt Sutton in debt, upon an Obligation to perform Covenants in an Indenture. There was a Covenant that the Defendant ought to do ſuch an act, thing, or things, as the Plaintiff or his Counſell learned ſhould devi'e, for the better aſſurance of certain Lands by himſelf to the Plaintiff: and ſaid, that a Counſellor adviſed him to have a Fine; And upon the Declaration there was a Demurrer. And upon the opening the Caſe Crook and Yelverton being only preſent agreed, That it ought to have been pleaded, that a writ of Covenant was ſhewn, and the tender of the note of the Fine is not ſufficient; But the breaking of the Covenant ought to be laid after the Dedimus poteſtatem ſued by the Plaintiff. And upon their adviſe the action diſcontinued without coſts.

Sacheverills Caſe before.

ATthowe ſaid, that the action lies. For a Leaſe made by Tenant for life, is a Leaſe derived out of all the Eſtates; and not as a Leaſe made in Remainder. But he who made the Leaſe had a Reverſion in poſsibility of a Reverſion; and for that he might joyn with him who had the Inheritance in that Action. 27 H. 8. Tenant for life, and he in Reverſion joyn in a Leaſe for life; And Tenant for life the place waſted; and he that had the inheritance the treble dammages; And in this Caſe had but a poſsibility of the Reverſion, and yet for that poſsibility they joyn in waſte. And it is all one whether there is but a poſsibility of reverſion, or a reverſion; If Tenant for life, and he in remainder in fee make a Leaſe for years, they joyn in waſte, and the reverſion does not hinder: Becauſe that the Leaſe is derived out of both. And the Leſſee ſhall make attendance, firſt to one, and then to the other. 13 H. 7. 17. And if it be upon ſuch a Leaſe or Covenant which is not collateral but goes with the Land; the Tenant for life ſhall have the benefit of them during his life, and the other after. But if one makes a Leaſe for life rendring a Rent, and grants the Reverſion to one for life, the Remainder to another in fee; Where the leaſe iſſues out of the whole reverſion, yet the diviſion by reverſion being by the party himſelf, they ſhall joyn in an action, 22 H. 6. 24 b. Tenant in fee makes a Leaſe for life, and then grants the reverſion to A. and B. and the Heirs of B Waſte is committed, and they joyn in waſte; And yet this Statute which comes to our Caſe is made after the Leaſe. And in this caſe, if he who had the Inheritance, his Son and the Survivor ſhould joyn in waſte. For the Law makes the diviſion of the reverſion. If Baron ſeiſed in right of his wife, and they joyn in a Leaſe for years, or for life, rendring a Rent, the wife dies, the Husband being

Trin. 4 Car. Com. Banc.

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Trin. 4 Car. com. Banc.

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1 Go. 225

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RIchard Newton and James Elliot againſt Sutton in debt, upon an Obligation to perform Covenants in an Indenture. There was a Covenant that the Defendant ought to do ſuch an act, thing, or things, as the Plaintiff or his Counſell learned ſhould deviſe, for the better aſſurance of certain Lands by himſelf to the Plaintiff: and ſaid, that a Counſellor adviſed him to have a Fine; And upon the Declaration there was a Demurrer. And upon the opening the Caſe Crook and Yelverton being only preſent agreed, That it ought to have been pleaded, that a writ of Covenant was ſhewn, and the tender of the note of the Fine is not ſufficient; But the breaking of the Covenant ought to be laid after the Dedimus poteſtatem ſued by the Plaintiff. And upon their adviſe the action diſcontinued without coſts.

Sacheverills Caſe before.

ATthowe ſaid, that the action lies. For a Leaſe made by Tenant for life, is a Leaſe derived out of all the Eſtates; and not as a Leaſe made in Remainder. But he who made the Leaſe had a Reverſion in poſsibility of a Reverſion; and for that he might joyn with him who had the Inheritance in that Action. 27 H. 8. Tenant for life, and he in Reverſion joyn in a Leaſe for life; And Tenant for life the place waſted; and he that had the inheritance the treble dammages; And in this Caſe had but a poſsibility of the Reverſion, and yet for that poſsibility they joyn in waſte. And it is all one whether there is but a poſsibility of reverſion, or a reverſion; If Tenant for life, and he in remainder in fee make a Leaſe for years, they joyn in waſte, and the reverſion does not hinder: Becauſe that the Leaſe is derived out of both. And the Leſſee ſhall make attendance, firſt to one, and then to the other. 13 H. 7. 17. And if it be upon ſuch a Leaſe or Covenant which is not collateral but goes with the Land; the Tenant for life ſhall have the benefit of them during his life, and the other after. But if one makes a Leaſe for life rendring a Rent, and grants the Reverſion to one for life, the Remainder to another in fee; Where the leaſe iſſues out of the whole reverſion, yet the diviſion by reverſion being by the party himſelf, they ſhall joyn in an action, 22 H. 6. 24 b. Tenant in fee makes a Leaſe for life, and then grants the reverſion to A. and B. and the Heirs of B Waſte is committed, and they joyn in waſte; And yet this Statute which comes to our Caſe is made after the Leaſe. And in this caſe, if he who had the Inheritance, his Son and the Survivor ſhould joyn in waſte. For the Law makes the diviſion of the reverſion. If Baron ſeiſed in right of his wife, and they joyn in a Leaſe for years, or for life, rendring a Rent, the wife dies, the Husband being

Trin. 4 Car. Com. Banc.

ing intitled to be Tenant by the courteſie, it is now his Leaſe, and he ſhall have the Rent. And the Book ſæms that he and the Heir ſhall have an Action of Waſte; For the Law makes that diviſion. If Tenant in fæ makes a Leaſe for years, and takes a wife and dies, and the Feme recovers Dower; That Leaſe is not diſpunifhable with the devition by the Act of Law, and that Leaſe is derived out of all the Eſtates, and it is all one as if they had all joyned; Admitting that the words were, that the ſaid Henry had Authority to make Leaſes for lives; And that that makes it as effectual and as good as if all had joyned. Then it will be agreed, that it is the Leaſe of all. As if I give Authority to make a Leaſe of my Land; It is my Leaſe, and ought to be made in my name: and ſo the Authority is good againſt all thoſe. And if the Covenants had not bæn collateral, Iacinth ſhall have benefit of them; For although they are not parties to the Leaſe, yet the Law makes them ſo. And as they ſhall have thoſe benefits which grow by the Reverſion, ſo they ſhall have the waſte alſo. It will be objected, this Leaſe by Henry is derived out of the firſt Fine, and the Conuſees ſhall ſtand ſeiſed to that uſe. I agree, if it be meerly without reference to the Authority; for otherwiſe the Leſſee ſhall not be attendant to the Tenant for life. As ſuppoſe at the firſt the limitation was to the Leſſee for life, the Remainder to Iacinth, &c. rendring Rent, he in the Remainder ſhall never take the Rent. But in this Caſe it is otherwiſe.

Holmes againſt Chenie.

IN an Aſſumpſit the Plaintiff declares, that there was an account between him and the Plaintiff of divers ſums of mony; And it was found that the Defendant owed to the Plaintiff 3 l. And upon that he promiſed being required, he would pay it. And in arreſt of Judgement, it was ſaid. Becauſe the Plaintiff does not ſhew for what thing the mony was due, the Declaration was naught. To which Atthowe anſwered, That if it was upon an indebitatus Aſſumpſit generally, that the Action will not lye, although there had been many Preſidents ante hac to the contrary. But in Caſe you will give a years day to pay, upon which the Defendant aſſumes, the Action will lye. But there is a difference upon that and our Caſe put. That one was indebted upon a reall contract, and other things, and appears by account, that upon all Debts 40 l. is due, &c. Now by that the promiſe is upon the Account, and that had made all certain. Yelverton, There cannot be a debt upon an Inſimul computaſſit, without ſhewing of what nature the Debts were. Richardſon, An account cannot be of a thing certain. Debt upon an Obligation is and rent certain; And if thoſe with other things come in Account, and upon that an Action is brought, what ſhall be pleaded by the party upon the ſpecialty? Crook, Debt certain does not lye in Account. But ſuppoſe that part of the Obligation is payed; And afterwards by an Account it appears what is payed, and what not, and then he promiſes to pay the arrerages, which is proved, as he ought: For although Debt implies a promiſe, yet an Account not. Now when things are truly in certainty he may have an Action upon a general Inſimul compuraſſit. For the Law avoids prolixity of the Declaration, which would be infinite, if all petit Debts were named. And he agreed, that the difference put by Atthowe in the Caſe of an Action, &c. upon an Indebitat. Aſſump. Richardſon and Yelverton alſo agreed. Atthowe, It is ſufficient in an Action of the Caſe upon an Account, to prove the Account, without ſhewing what the Debt was. And he cited 3 H. 4. That a Debt certain with other things incertain may lye in Account, as in our Caſe there may be double charge

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prevented by averment; Although all the things in ſpecial, by which the debts did ariſe ſhall not be ſhewn, yet he ought to ſhew of what nature the debts were, as upon contracts ſo much, or upon mutat. ſo much, &c. and ſo infiniteneſs ſhall be avoided, &c. Moyle Pregnotary; That 22 Jac. That a general indebitatus is now in peace: For it was ruled by all the Juſtices in the Exchequer Chamber to be naught. Et adjournatur. Tria. 4 Car. Com. Banc

Walſingham and Stones Caſe.

IT was ſaid by Hutton in this caſe, That a Pariſhioner compounding for his tithes for his life, was naught without deed. And it was ſaid by Yelverton, That the uſe in the Kings Bench is: That if a Defendant in a prohibition dies, his Executors may proceed in the ſpiritual Court. And it may be a rule for the Judges in the Eccleſiaſtical Court to proceed alſo. And then the Plaintiff may if he will have a new prohibition againſt the Executors, &c.

Binge and Hodges.

IN Binge and Hodges caſe, one of the Jurors was named, Richard Smith in all the proceſs againſt the Jurors; And after the tryal, Ward moved in arreſt of Iudgement, for that, that Riſe Smith, was ſworn upon the tryal, and not Richard. And by the Court he cannot make ſuch an averment againſt a Record: For then an Affidavit overthrowes a tryal. And that which is aided by 21 Jac. cap. 13. is when a Juror is named by one name in one place of the of the Record, and by another name in an other place of the record; There now it ſhall be aided upon this Statute by averment, that he is the ſame man, &c. 1 Cr. 563 1 Go. 448 2 Cr. 116 Sty 110. Ow. 62 1 Ro 197

Briſtowes Caſe.

IN the caſe of one Briſtowe, The ſute was in the Court of Requeſts, for that that the Plaintiff and the Father of the Defendant had made ſuch an agrément to pay money, &c. And it was moved for a prohibition. And by the Court it was granted; for that that a mutual agreement is a ſufficient conſideration upon which an action upon the caſe will lie. And that notwithſtanding that there was a decrée in the Court of Requeſts againſt the Defendant there; And for that the ſute is againſt the heir, which is againſt the rule of Law, that the heir ſhall be charged in the place of his father; Whatſoever agrément the father makes, is nothing to the purpoſe to charge the heir, although he had aſſets, either by Law or equity: And the Court of Equity ought to give relief in ſuch caſes. For this agreement, although it be in writting, being without Seal, It is not but an Eccleſiaſtical agreement.

Mrs. Peeles Caſe.

MRs. Peele moved for a prohibition to the High Commiſſioners. King Charles 15 Feb. anno primo regni ſui granted a Commiſſion to divers to enquire Oyer and Terminer, of all inceſts, adulteries, and miſbehaviours. and all other crimes puniſhable by the Eccleſiaſtical Law, Afterwards there were divers articles exhibited to them againſt the Lady Purbeck for adultery, and Mrs Peele, and others; That ſhe in Annis Domini 1621, 1622, 1623, or 1624. in ſome one or all of theſe was an Abettor of this Adultery. For which ſhe was ſentenced to pay 200l. &c. and that ſhe made a penitential acknowledgement of her offence, and farther that ſhe ſhall be impriſoned untill ſhe found ſecurity for the perfor. mance of that order. And upon the Articles and the ſentence, the general pardon of 21 Iac. was pleaded. Henden prayed a prohibition, and agreed that they might aver that the whole offence was committed be-

Trin. 4 Car. om. Banc. C[illegible]

fore the pardon. And he cited a caſe in the Common Bench, 6 Iac. rot. 142. Longdale was charged with adultery, and the charge was laid after the pardon. Yet that charge did not ſo conclude him, but that he might aver that to be before, to have the benefit of the pardon. It was urged on the other ſide, that ſuch averments would overthrow infinite ſentences given before. Bramſton, It is pretended to be done after, for the averment is not but a monſtrans of the truth of the matter, and the Subject ſhall never have benefit of the pardon without ſuch averments. Athowe, it appears that there was an offence, and it was proved alſo. And if you allow a prohibition, you overthrow all ſentences there. And alſo a prohibition ought not to be grounded upon ſeveral matters, but one only. Yelverton ſaid that a prohibition may be grounded upon twenty matters. Crook, Admitting that all the offence was committed after the pardon, yet you may ſuggeſt it to be before. Henden and Bramſton, That ſo it was Paſ. 50 Eliz. In one Prat and Huſſeys Caſe; One that had a benefice took another, but was not inducted. Yet that was the irregularity upon which he was deprived, and a prohibition was prayed upon the general pardon; And it was concluded, That if the libel contained, that the irregularity was before any pardon; and it appears alſo, that it continued after, yet a prohibition ſhall be granted. Crook, the offence is laid 1621, 1622, 1623, &c. in one or every of them. Now for a prohibition, there are two clauſes in our caſe. Although it be that the offence was before, and part after pardon, yet we ought to grant a prohibition; for that which was before is involved. 5 Iac. Conveys caſe. He and his wife after the death of Sir Blunt, were ſued before the high Commiſſioners, for that that his wife committed Adultery with Sir Richard Blunt, and he himſelf was the Pander. And a prohibition was granted for two cauſes: The one, for that Adultery was not inquirable there, the other, becauſe it was pardoned. And although the word Adultery be in their Commiſſion, yet that does not give them Juriſdiction. They cannot meddle with Alimony was one Conditts caſe upon the Canons in 1 Iac. Which gives to the Parſon juriſdiction to appoint the Clark of the Church: There was a cuſtom there that the Parith ſhould appoint it; and ſeveral Clarks being appointed, they ſet ſeveral Pſalmes in the Church, to the diſturbance of it. And a prohibition was granted to the high Commiſſioners for meddling with it. Richardſon objected divers things with much earneſtneſs, but ſo apparently contrary to Law, that I have omitted it. Yelverton ſaid, ſhe ought not to put in ſecurity to obey the ſentence. For if it be averred that all was before the pardon, then there was no cauſe of ſentence, and if no ſentence, then the prohibition ought to be for all. Crook, The ſentence is to pay a fine, and to make ſubmiſſion, and to be impriſoned, until ſhe found ſecurity to obey the ſentence; That is void. Richardſon ſaid, That they had not any means to make the party to pay the fine, and if ſhe would pay it preſently ſhe might be diſcharged. But by the other Juſtices the High Commiſſioners, cannot demand the fine; But they may Eſtreat it into the Exchequer. At another day it was ſaid, Sir Wil. Chamcer before the high Commiſſioners was by ſentence fined and impriſoned, and by the opinion of all the Judges of England, They may proceed by fine and impriſonment; and his caſe was for Adultery. Hutton 44 Eliz. It was reſolved that they cannot impoſe a fine, but for Hereſies, Schiſms, and Errours, &c. Richardſon, The words of the Statute are, that the high Commiſſioners may proceed according to the tenour and effect of the Letters Patents of the King. Yelverton, The ſentence is the fine and the penance, and there is the end of the ſentence; and when it is ſaid, ſhe ſhall be impriſoned until, &c That is no part of the ſentence, If it was that ſhe ſhould pay a fine, do pennance, and ſhould be impriſoned three months; Then all

ſhould

ſhould be the Sentence. Richardſon ſaid, that they may proceed a- gainſt other things than Hereſies, and Schiſmes, upon that Statute de primo. For there are the words Abuſes, Contempts, Offences, and Enormities. Hutton, The words in that Statute ſhall have expoſition according to the meaning of the firſt intent. It was that they had Authority to puniſh the Biſhops and Prelates for Errors and Schiſms, and the change of Religion. For that that they did not regard the power of the Ordinary. But they had incroached many other things. And if thoſe words include any thing, they might puniſh any thing whereof the Eccleſiaſtical Court had Authority; As working upon Saints daies. But there was a Caſe of one that was ſentenced there for ſuch a Cauſe. And the Fine eſtreated. And upon Argument in the Exchequer their proceedings adjudged void. Richardſon, The word Enormity contains a thing of leſſer nature; For quicquid eſt contra regulam et normam Juris is Enormity. And therefore in Treſpaſs, quare clauſum fregit, et alia enormia ei intulit. But Yelverton, The word ought to be intended of a grand offence; For ſo in common acceptance it imports. Harvey, The Fine being pardoned, all is pardoned. Richardſon ſaid, that they ſhould proceed by excommunication and not by fine and impriſonment. No more at this time was ſaid in this Caſe.

Trin. 4 Car. Com. Banc.

Humlocks Caſe.

A Man makes a Leaſe for 21 years reſerving 20 l. rent per annum, payable at two daies, and if he fayl of payment, that it ſhall be lawfull to the Leſſor to enter. At the day of payment the Leſſor came and demanded the Rent by theſe words, I demand my half years rent. And it was moved by Atthowe, If that demand was ſufficient for the Leſſor. Hutton and Yelverton ſeemed that it was ſufficient. For the thing that he demanded is enough certain and known. Crook on the contrary. For although it appears by the circumſtances, how much of the Rent he demanded, yet the words are not ſo plain as they ought to be. For if a man makes a Leaſe for years, reſerving ſuch a Rent as the antient Farmor was wont to pay from time to time to this day. When the Leſſor comes upon the Land, and ſays to the Leſſee, Pay me my Rent: that is not ſufficient or good: becauſe it is not certain in Terms: And yet it appears by the circumſtances. And when a man pleads a demand, he ſhall ſhew the Leaſe, and the Rent reſerved, and ſhall ſay, That he demanded redditum prædictum. And as I remember it was adjudged very lately; That ſuch a Demand ſhall be certain. Hutton, I hold a difference between ſuch things which lye in notice of the perſon to whom the demand is made, and where not. For in a præcipe quod reddat: if there be a recovery by default, and the Tenant brings a deſeit: and by examination of the Summoners it appears, That they came to the Land, and ſummoned him in the Land, but they do not ſhew to him at what day he ought to appear. So the Leſſee knows well enough that the Rent ought to be paid: for it is certain by the Leaſe, to which he is party and privy. But Crook ſaid in the Caſe that Hutton put. If the Summoners had read the Writ upon the Land, and had ſummoned him to appear at a day compriſed in the Writ; It had been certain enough. And ſo in this Caſe, if he had read the Indenture upon the Land, and after demanded the Rent, as afore it had been. Without queſtion it appears to me it ſhould be good enough. And ſo in our Caſe alſo.

Trin. 4 Car. Com. Banc.

Leech against Watkins.

IN Debt upon an Obligation. The Condition was, that if the Obligor and his Heirs did, or suffered to be done, every such assurance as the Councill of the Obligee should devise, when he should be thereunto required. And it was shewn by Ward, That the Obligee made such a request (scil.) That the Obligor and his wife should levy a Fine; If that Request were sufficient was the Question. Hutton, I think that the Request is not sufficient; Because it is not pursuant according to the Obligation. Richardson, I think although the request be void for the wife, and that she is not bound to make an assurance, Yet the Obligor is bound to do it. For against him the Request is good enough.

Thompson against Thompson.

IT was said by Hutton, In debt against Executors, if the Plaintiff had Judgement against the Defendant, and sued a levare fac. de bonis Testatoris. If the Sheriff upon that return a Devastavit; the better form is upon that, to award a scire fac. against the Executor before, that a fieri fac. shall issue of their own goods. For that writ of Execution is warranted by the first Judgement, which was but of the Goods of the deceased. But now if there be issued a fieri fac. de bonis testat. si habuerint, et si devastaverint de bonis propriis, Then I will agree that upon that shall issue a Capias against the Executors ad satisfaciendum.

Dixson and his Wife against Blyth.

IN this Case a Question was demanded by Atthowe; If a man seised in right of his wife, leases for life, the Remainder over, in Fee; And afterwards he and his wife recover the same Land in a Writ of Entry in the post against the Lessee for life; If the Wife by that shall be remitted. Hutton seemed that she shall be remitted, As well as where a Feoffment is made to Baron and Feme, For that Recovery countervails a Feoffment, and no laches shall be adjudged in the Wife; For the purchase of the Writ shall be adjudged the Act of the Husband only, and not the Act of the Wife. But it is good to be advised of that, for peradventure she shall be estopped by the Record.

Hob 255 Kel. 12 Lit [illegible]

Bromefields Case.

IT was agreed by all the Justices, That if Tenant in tayl by Indenture, upon consideration of mariage, covenant with an other that certain persons should be seised to his use for term of his life, and after his decease to the use of his Son and Heir apparent; That by that Covenant there is not any use changed unless only during the life of Tenant in tayl.

1 Andr. 291. Cr. El. 279 Far. 21

Nortons Case, before.

FInch Recorder, said de comuni jure for Estovers burnt in an house, tithes ought not to be paid; by the Common law there was not any tithes paid for wood: And although the Statute of 25 E. 3. gives a prohibition

bition ſor timber, yet Underwoods were diſcharged of tithes. See Doctor and Student 171. It is expreſs that Eſtovers are not tithable, because they are not renewing every year, and it is parcel of the Inheritance, for to deſtroy all the underwoods is waſte. And there is another caſe put, where tithes of wood had not by the cuſtom been paid, neither ought they to be paid in law or conſcience: But that is not to be intended, the conſcience of every particular man. Dawleys Caſe was reſolved for the Wilde of Suſſex, and Michaelmas 13 Iac. Banc. Roy. in the caſe of Porter and Dike for the Wilde of Kent of the ſame preſcription, reſolved to be good; And ſo is the common experience that a whole County may preſcribe ſo. And the reaſon is for that, that by the Common Law it was not due, but by the conſideration of Winchelſey Linwood 104. It was ordained to be paid, For then the prelates imputed a great peſtilence that then was, for the negligence of paying tithes, and appointed tithes of wood. And the Commons were deſirous to have the Statute of ſilva. &c. otherwiſe explained than the Clergy declares it, For they ſay that they ought not to pay tithes of any wood that is of the growth of 10 years. Hutton, Wood is tithable in their nature, and then there may be a cuſtom to diſcharge them. And the caſe of Hartbpenny cannot be anſwered; for if he ſues for the penny, a prohibition ſhall not be granted, quod conceſſum fuit. Crook and Yelverton. But of things not tithable, tithes of them cannot be ſued, without alleging a cuſtom. Crooke, It is known that Hartbpenny is good by preſcription: This Caſe is when there is not land belonging to the houſe, ſo that the Parſon is not anſwered for his tithes another way. But when there are ten ſervants kept for the maintaining it, Then by the Law of the land it appears, that tithe ought not to be paid, although cuſtom had been alleged it is nothing to the purpoſe, as if a cuſtom is alleged to pay 4 d. for every acre in diſcharge of tithes, and the verdict finds 3 d. no conſultation ſhall be granted. And ſo for wood to fence the ground, or dry cattel to manure the ground: Although cuſtom be alleged there in diſcharge of it, and found againſt the party, yet no conſultation ſhall be granted. Hutton, the herbage of barren Cattel is tithable, becauſe there is a cuſtom which diſcharges thoſe which are for the Cart. And he ſaid that the Cuſtom only makes that legem terræ. And he cited Doctor Graunts Caſe. He libels for tithe of an houſe, and the party brought a prohibition, and alleged modus decimandi, &c. And it was alleged in arreſt of Judgement, as houſes were not tithable de communi jure, and yet a conſultation was granted. And there Cook put this caſe, which I do not remember in the printed book, that one libelled for tithes of trees, and cuſtom alleged, and there was found no ſuch cuſtom in diſcharge; yet it was ruled that no cuſtom was granted.

Trin. 4 Car. Com. Banc.

Browne againſt Hancocke.

BRowne brought an action upon the caſe, upon an aſſumpſit againſt Hancocke, and declares, that whereas the 10. of May, 16 Iac. there were ſome controverſies between Charls Nichols, and the Brother of the Defendant, concerning arrerages of rent, and it was deſired that Nichols would part with his term. And 19l. and a cloak and a gelding were offered to the leſſee for his term, which he refuſed. Afterwards the Defendant in conſideration that the Plaintiff would labour with Charles Nichols to take the offer, and make an end between them; Aſſumed, that whatſoever the Plaintiff undertook for the Defendant, he would perform, and alſo ſave him harmleſſe for any thing that he ſhould doe in that buſineſſe: and then he ſaid that he procured Charles Nichols to aſſign his term, and to accept the cloak and gelding, which the Defendant did not perform, and

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Trin. 4 Car. Com. Banc.

alſo that the Plaintiff covenanted with Charles Nichols to perform the agreement, and obliged himſelf to that in 50 l. And that afterwards Charles Nichols filed a bill of debt for the money, whereupon he compelled him to pay it, and upon non aſſumpſit pleaded it was found for the Plaintiff, and three things were moved in arreſt of Judgement, which Serjeant Barkely anſwered. There was a covenant to enter into an obligation at Michaelmas, and the Plaintiff ſhews that he entred before; So he does not perform the conſideration, which he conceived to be a good performance. For if a man be bound to doe an act, or pay money at Michaelmas, a payment before is good. H. 7. 17. 2. paſc. It is ſhewn that an action of Covenant was brought after; And they ſay, that upon his ſhewing covenant does not lie, but debt: but he ſaid, that the Plaintiff had his election here to have debt or covenant. As in the Lord Cromwels caſe, the words covenanted provided and agreed, give advantage of a condition or covenant. If a covenant had been for 30 l. then debt only lyes; But here it is to perform an agreement. Thirdly that it appears within the declaration that the action of the caſe was 6 years before the action brought; And ſo by the Statute of 21. Jac. the action does not lye. I agree if the cauſe was 6 years before; yet the breach was within the 6 years, and that is the cauſe of action. 6. rep. 43. In a covenant, there is the deed, and the breach of the covenant, and that is the cauſe of the action; And therefore being matter in Deed, an accord with ſatisfaction is a good plea to it. 13. E. 4. Attaint is grounded upon matter of record, but the falſe oath is the cauſe of it. For that there alſo, accord is a good plea; So in our caſe, the non performance by default was not at the time limitted, which was before the 6 years: but no action was brought againſt the Plaintiff, untill within the ſix years; And then he is not damniſied untill within the ſix years 5 Rep. 24. Richardſon. For the two firſt exceptions he agreed with Barkley, as to the third, he ſaid, that there can be no action before the breach of the promiſe, or covenant; But the breach here is before the ſix years; for the non performance of the agreement is a breach and a breach is a damnificationn. In one Boughtons caſe, the non payment is a damnification But all the queſtion here was whether that ought to be pleaded but I conceive that it need not; for by the Statute-law the action is taken away. And it being a general law, the court ought ex officio to taken notice of it. For in that after verdict, if it appears that there is no cauſe of action, although the verdict be found for the Plaintiff, he ſhall never have Judgement. And upon the matter that latches in time amounts to a releaſe in law, & the proviſo cannot ayd you. For every man ſhall be intended without thoſe diſabilities: for that, that he would ſhew that he would have advantage of it And Crook of the ſame opinion for the reaſons given before, and ſaid, that although the Statute took away the Common law; yet it is good law, and done for the eaſe of the ſubject, and for that ſhall be favoured, as the Statute of limitations in all caſes. But he ſaid, the non performance was not a damnification before the action brought. As if I be bound as for ſurety for A. who is bound to ſave me harmleſſe; Although he does not pay it at the day, There is not a breach before the arreſt or Judgement. For by the Judgement, the lands and goods are liable; But for the arreſt, his body is troubled, for that now the Scriveners put in ſuch obligations that they ſave harmleſſe the party, and pay the money at the day; But for the other matters, in all he agreed, and cited Richardſon and Burroughs Caſe. Where a payment before the day, was adjudged a payment at the day. Yelverton, That is not found that there is any ſufficient notice given to the Defendant by the Plaintiff of the agreement made, which he ought to have. And he agreed in omnibus with Richardſon, and ſaid, that Scriveners uſe things, ex abundanti. Richardſon, It is ſaid, habuit notitiam in the Declaration,

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Denne and Sparks Caſe, before.

Richardſon, If a will be of lands and goods, and that was the occaſion of this will: the revocation is only tryable at the Common Law; But when the will is of goods only, the occaſion of it ſhall be tryed only in the Spiritual Court; For it is incident to the probate of the will, quod fuit conceſſum; And he ſaid, that in the caſe before, if the will be not revoked, the deviſe is good, at the time, and the adminiſtration ſhall be granted as of his goods; for the Law will not change the property of the reſidue, after debts and legacies paid. Crooke, The caſe here is that the Teſtator makes his will of his lands and goods, and deviſes the reſidue of his goods, ut ſupra, to his wife his Executrix, who dies before probate. Denne ſues to be adminiſtrator, as the goods of the firſt Teſtator; and alleges revocation; which becauſe that his Proctor did not goe and ſwear that in fide Magiſtri, ſentence was given againſt him. Upon that he appeals, in which there was the ſame Obligation, and affirmed by the Oath of his Proctor; Yet ſentence was given againſt him; And a prohibition ought to be granted for three reaſons.

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Preſidents were ſhewn, that ſuch actions were brought, ſcil. Hill. 3. Car. Elwin againſt Atkins, and Hill. 1. Car. Cophin againſt Cophin. both in this Court. And Richardſon ſaid, although the book makes a doubt of it; yet his opinion was that the action would lie; For it would be a miſerable thing that all things ſhould be ſhewed preciſely; And ſo Judgement was given for the Plaintiff.

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Port

Trin. 4 Car. Com. Banc.

Port againſt Yates.

IN a replevin the caſe was, The Defendant was known as Bayliff to Thomas Kett, and the land was Copphold land. And 10 Maii. 3 Car. When it was granted by the Lord of the Manor to the wife of Thomas Kett. The Plaintiff confeſſes that the Land is Copphold land, but that the Lord granted, 1 Iacob. to Robert Salter in Fee, who had two daughters; the wife of the Plaintiff, and the wife of Thomas Kett, and dyed ſeiſed, and that the land deſcended to them; upon which they demurred. Berkely, The firſt grant ſhews that the Defendant was in of all, and the deſcent to the wife, but for the moyety, whereupon the grant of the whole is not traverſed nor confeſſed and avoided. And he cited Dyer 171. Pl. 8. to be the ſame caſe in effect, and ſo ruled. But Hutton Harvey and Crooke held what difference there was between this caſe, and the caſe in queſtion. Hutton, the deſcent here which is pleaded, makes the ſecond grant void. But by Richardſon, although that it be avoided, yet it is not confeſſed. And afterwards for that that upon the whole truth of the matter diſcloſed, It appears that a Copartener cannot diſtrein the lands of another damage feaſant, and the matter of form in pleading ought not to be regarded by the Iudges, upon the Statute of 21 Eliz. cap. 5. Iudgement was given for the Plaintiff.

Cockett againſt Delayhay.

COcket brought an action upon the caſe in Briſtow againſt Delahay for theſe words, Cockett hath forged a deed, and becauſe of that came out of his own Country And the Defendant juſtifies that he did forge a Deed in Middleſex of lands in Hartfordſhire, without that that he ſpoke in Briſtowe. Richardſon ſaid, that that plea was naught, either with traverſe, or without the Traverſe. Whereupon Henden altered his plea, (ſcil.) That he forged a deed of thoſe lands at South Mimms in Middleſex, where the lands lie. By vertue of which he juſtified the words at Briſtowe. Richardſon, It is a good plea; for now the other can plead nothing, but de injuria ſua propria. And then the tryal ſhall be in Middleſex. And by Crooke, if there be a Demurrer, there ſhall be a writ of inquiry of damages iſſue to Briſtowe.

Iſſue.

IF the iſſue be not made up, it may be tryed by Proviſo. But if the Plaintiff neglect that, there may be called a non-ſute upon the roll, for there it ſhall be diſcontinued, quod nota.

Page againſt Tayler.

PAge brought an Action againſt Tayler as Receiver, &c. which was found againſt him, &c. And Iudgement was given that he accounted, and before the Auditors he pleaded that before the Action brought, there was an arbitrement, that he ſhould pay to the Plaintiff 11 l. in ſatisfaction of all accounts and demands, which he had performed. And it was ruled by the whole Court, that that was not a good plea, in diſcharge before Auditors, but a plea in bar of the account. And by Crooke, an accord with ſatisfaction may be pleaded in Bar, not in diſcharge. Which the Court ſeemed to agree. And by Crooke, If the Defendant had any other matter to ſhew on the Declaration before Auditors, it might be ſhewn, &c. Richardſon, Although that the Arbitrament

ment was made, after the action brought, it cannot now be pleaded but he ought to have his Audita querela. Trin. 4. Car. Com. Banc

Manninghams caſe.

In Manninghams caſe. The doubt was this, A condition of an obligation made to Manningham, was that he ſhould pay after his death to his Executors after his death 10 l. per annum to the uſe of the Children of Manningham. And Manningham dyed, and there was no Executor, whether the payment ſhould be to the Adminiſtrator, and ſo the obligation forfeited. Berkly ſaid, that it ought to be payed to the Adminiſtrator: for an Executor includes an Adminiſtrator; And this money is as aſſets, if not to ſatisfie debts, yet to perform this caſe which is illegal. 5 H. 7. 12. 26 H. 8. 7. And alſo if a man limit a thing to be done to his Executors, that may be done to his Adminiſtrators. So that the nominating of the Executor, is not but an expreſſe intention to whom the money ſhall be paid (viz. to him who preſents his perſon. And he compares that to the caſe of 46. E. 3. 18. A rent upon a condition reſerved to the Executors, goes to the Adminiſtrators. 15 E. 4. 14. Dy. 309. Cranmers caſe. Where it ſeemed that if a leaſe be made to one for life, and after to his Executors for years; that the Executors ſhall not have the term as aſſets, 32. E. 3. A quid juris clamat Fitzhard. A Leaſe for life, to his Executors for years in remainder, Leſſee for life attorns ſaving the term; which proves that the Executor had that as privy, not as ſtrangers. And he cited Chapmans and Daltons caſe, the principall. So that the Infant and the Executors ſhall have the money in right of the teſtator: and therefore it goes to the Adminiſtrator.

Secondly The Executor extends to an adminiſtrator. 8. rep. 135. there kindes of Executors: and an Adminiſtrator is an Executor datious. 3 H. 6. An action is brought againſt divers executors by the Statute: when ſome appears upon the diſtreſſe, it anſwers, that extends to an Adminiſtrator although the Statute names only Executors.

Thirdly, It does not appear here that Manningham made not Executors, for it may be that he made Executors, and that they dyed inteſtate or before probate. And he cited 18. H. 8. And Shelleyes caſe 1. rep. and 33. Eliz. If Executors dye before probate. It is in Law a dying inteſtate, Richardſon. Here is but meer truſt; and as it hath been ſaid; It doth not appear whether he had made Executors or not. For if he dye, and makes Executors, and they dye before probate, or refuſe, he dyes ab inteſtato, but not inteſtate; Nor ſhall it be queſtioned, if the obligation had been to pay to Manningham only, or to him and his Executors. But it goes to the adminiſtrators. But becauſe that he had ſpecially put his Executor; Whether he ought to have the forfeiture of the obligation, or whether he ought to have the ſum to be annually payed to the Adminiſtrator. Berkley, the letters of adminiſtration make mention, that he dyed ab inteſtato. Atthow, That is matter de hors, but by the declaration it is clear that he dyed inteſtate. And the action brought by Adminiſtrator who who had not any cauſe of action. Secondly, admitt that there was an Executor, and the money payed to him; that is not aſſets; For it is not the money of Manningham, but taken by him to pay to another. And Richardſon ſaid: If the party had dyed inteſtate, by the Common law, the Adminiſtrator is Executor, and all things that were to be performed by the Executor, are to be performed by the Adminiſtrator. There was an obligation to A. to pay to the Executors of B. It ſhall be more doubted there: whether it ſhall be payed to the Adminiſtrator. But the obligation here is to Manningham himſelf. Now his Executors comprehend Adminiſtrators: And Needhams caſe is plain in that. And the mention

Trin. 4 Car. Com. Banc.

was that the money ſhall be payed to theſe that ſucceed him in his perſonal Eſtate. Now it was not the intent that it ſhould be loſt if he dyed without Executors. Crook an action of debt being brought againſt an Executor upon an obligation; plene adminiſtravit is pleaded. Then Adminiſtrator being included in the word Executor, there is a good cauſe of Action. And the Court ſeemed to be of the ſame opinion. Sed adjournatur.

Fowlers Caſe.

FOwler libels for tithes, and a Prohibition was prayed upon a ſuggeſtion that he came to the Church by Symony. By the Court, a Prohibition ought to be granted upon a ſurmiſe only, that he came to the Church by Symony. Then Henden ſhewed, That it was found by verdict in the Kings Bench, That he came in by Symony. And upon that verdict there was a decree in the Court of Wards accordingly. And then the Court inclined to grant a Prohibition. And the Caſe here was, That Fowler being convicted of Symony, the King preſents Glapthorn, who was admitted, inſtituted, and inducted; And afterwards he takes another benefice above the value of 8l. by which the other was void. Yet by the aſſent of the Lord Windſor Patron, Fowler continued poſſeſsion. And by Richardſon, He cannot be any way removed until laps incurre.

Strange againſt Atthowe.

SIr Hamond Strange brought treſpaſs againſt Chriſtopher Atthowe. And the treſpaſs was done 8 years after, but with a continuando unto the time limited by the Statute 21 Iac. And by Richardſon the action is toll'd by the Statute. For the continuation within the time; makes the Treſpaſs within the time; And it is not like the Caſe in Dyer, 119 pl. 17. In the turning of a Cock; It was adjudged a new diverſion, for it was a new action. But here is not a new act done. Richardſon, the Statute of 21 Iac. may be well pleaded in this diſcharge of that action. And upon ought to commence for all not done after the time of the limitation within the Statute; otherwiſe the Statute ſhould be overthrowed; For by that means the continuando may puniſh a treſpaſs done 20 years paſt, with the alleging of a continuando. Hutton & Crook of the ſame opinion. Yelverton on the contrary, who ſaid, that it was not material if the Statute was overthrown. But the other Juſtices ſaid, it was a good Statute. Crook, Suppoſe that you cannot prove your continuando, for in treſpaſs it is not requiſite indeed to prove it; For it is only put for increaſe of damages. But Hitcham ſaid, Now by the Statute the continuando ſhall be proved. Then by Richardſon, Hutton, and Crook. You will make a fraction That the treſpaſs ſhall be partly upon the Statute, and partly upon the Common law.

It was ruled again according to that before; That when a Will was proved in the Prerogative Court; The Executor or Adminiſtrator may be cited out of the Dioceſs where he lives to the Prerogative Court, Becauſe that the Will cannot be executed alibi than where it was proved. And ſo that is out of the Statute of 23 H. 8. But by Richardſon, Hutton, and Yelverton, Where a Will is proved in the Prerogative Court; That it ſhall be proved in the proper Dioceſs alſo of the Executor, then it may be executed there. Richardſon ſaid, The privilege for them of the upper Houſe continued 30 daies after the Seſsion; where the Parliament of the lower Houſe but for 20 daies. And that the privilege extends to Perſon, Goods and Lands.

Nortons

Mich. 4 Car. Com. Banc.

Nortons Caſe.

IN Nortons Caſe before; A Conſultation was granted, becauſe of a Cuſtome alleged, and found for the party. But by Crook and Yelverton, There are divers Preſidents, where in that Caſe a Prohibition was granted, without alleging a Cuſtome.

Allen againſt Weſtby before.

IT was ruled, That the Defendant ſhall not have coſts againſt the Informer, they being found againſt the Informer. And Brownlow affirmed that the courſe of the Court is, That upon the Statute the Defendant ſhall never have coſts againſt the Informer; Although Binge cited a Preſident to the contrary.

Termino St. Mich. Anno 4 Car. Reg. Com. Banc.

Goſſe againſt Skipton.

IN the Court of Requeſts, Goſſe borrowed mony of the Teſtator of Skipton, and gave a term whereof he was poſſeſſed, for five years, to him for ſecurity, by Indenture with a Proviſo of redemption: And ſhews further in his Will, that there was a verbal Agreement between them; That if the mony was not paid at the day, the Teſtator ſhould take the profits growing upon the Land; And if the profits amounted to the value of the ſum of mony, that then he ſhall have his term again. And that he reaped the profits accordingly, which well ſatisfied him, and yet he continued poſſeſſion of the term; Which afterwards came to Skipton, and is now expired. And ſo he prayed that the Defendant might account for the profits. And the Defendant moved for a Prohibition. Richardſon, Although the truſt is contrary to the Indenture, yet ſuch an averment is good, notwithſtanding the Proviſo. But for that that the Executor ſhall account to none but the King; and the years are now ſpent. And although he occupied the ſame, yet the profits ſhall be Aſſets. And if it ſhall be received in the Court of Equity, there ſhall be a Devaſtavit againſt the Executor. And by the whole Court a Prohibition was granted.

Rolls againſt How.

A Man arreſted upon a Latitat makes an Obligation to the Sheriff with a Condition to appear. And the Queſtion was, if it be good. For he may make his appearance by his Attorny. Although Hutton thought it was not good. For the Law intends that he is in perſon when he is in cuſtodia Mareſcall. And Brownlow ſaid, it was adjudged accordingly, when Mr. Tomkins Bayliff of the liberty of St. Andrew took an Obligation in his own name, for a perſonal appearance upon a Latitat. At an other day Atthowe moved, that the Bond was void. For the Statute is general that he ſhall take a Bond for his appearance. And now the Sheriff here had taken a Bond for his perſonal appearance. And there he might anſwer to the Action by his Attorney. But that he ought alwaies to be in cuſtodia Mareſcal. which is meant in proper perſon, and he ought

Mich. 4. Car. Com. Banc.

to put in bayl which is good enough. It was ruled, that Judgement ſhould be entred for the Plaintiff, if cauſe was not ſhewed within two dates. And Bents Caſe and Hoptons were adjudged accordingly. See 30 Eliz. rot. 426. In the Caſe of a Sheriff there.

Wroth againſt Harvey.

DOwer was brought againſt an Infant, and upon default Judgment was given againſt the Infant, and there was ſomething aſsigned for error, but notwithſtanding Judgement was affirmed as to that, But afterwards an other errour was aſsigned in the record; For that that the entry is obtulit ſe per Clerk atturnatum ſuum, and names him not: And ſo was the Caſe, where ſuch an one, by Higgius atturnatum ſuum obtulit ſe; And for that cauſe naught. And Dyer 93. Becauſe in waſte the obtulit is per atturnatum ſuum, and names him; it was naught. But Richardſon ſaid upon the firſt obtulit ſe, it is not requiſite to name the Attourney, but upon the ſecond.

Barleys Caſe.

NOte, It was ſaid by Richardſon, If a man ſays in his ſickneſs, I give 20 l. to I. S. and does not make Executors; Yet I. S. ſhall recover againſt him who has the goods. Crook ſaid that, 3 H. 4. That a deviſe is void, if a Legacy be given, and no Executors made.

Winchcombe againſt Shepard,

IN an action of the caſe for cutting of the bank of the River, of Charwell, by which the water run forth and drowned his meadows. The Defendant pleads in bar, that one Brooke was ſeiſed of a Mill called Gammons Mill, and that there is a certain rivulet between Gamons Mill aforeſaid, and Clyftons: And that he and thoſe whoſe Eſtate he had, in Gamons Mill, have uſed time out of mind, &c. as often as the ſaid Gammons mill ſhould be ruinous, to cut the aforeſaid bancks of the aforeſaid rivulet, in which the Treſpaſs aforeſaid is ſuppoſed to be done, and to let out the water in old Charwell to repair the mill. And he ſhews that the mill was ruinous, and that he cut, as aforeſaid, to repair; and the water run out of the ſaid old Charwell, and ſo juſtifies. And there was an exception taken by Atthow to this bar. For that that he does not anſwer nor juſtifies to the place where the Treſpaſs was done: For he ſaid that there is quidem Rivulus, which is always to be intended of a ſtrange thing. As 6 E. 6. Dyer 70. In Treſpaſſe the Defendant ſaid, quod quidam I. S. granted the part to him; and afterwards ſaid again, quod quidam I. S. granted. And becauſe that he conveys two grants to himſelf by two perſons, for ſo the ſecond quidam ſhall be intended: And it was ruled to be naught. See the 33 and 34 Eliz. Debt by Lowe againſt Wotton. The Defendant pleads that a long time after the Obligation was made by himſelf and Baſſett, quod quidam Iohannes Baſſett acknowledged a Statute to the Obligor; And becauſe that he ſays quidam, which ſhall be intended a ſtrange perſon, it was no plea. And the debt upon the Obligation is gon by the acknowleging the Statute. See 9 H. 6. 16, 17. In a quare impedit for the King, of the Chauntry of St. Tho. and alleges a preſentation. The Defendant ſays, that there is a Chapel of St. Thomas in the ſame Village, and that the Defendant and all his Anceſtors have been Patrons of the ſame Church. It was held no plea, for there is no anſwer to the title made by the King; For it ſhall be intended of another Chapel. But here becauſe that he ſaid virtute cujus, he cut the

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aforeſaid banks of the rivolet aforeſaid, in quo tranſgreſſi, prædict. fieri ſupponitur. A ſufficient anſwer was made to the ſame place; ſo ruled by the opinion of all the Juſtices. But it was objected, that this barre was not good upon the matter; For although he might let it out, yet he ought not to drown any ground. But becauſe that the fault was in the banks of old Charwell, he is not puniſhable for that lawfull Act, which he had done. Otherwiſe if he had not preſcription, 6 E. 4, 6. If I have a pond, I cannot ſo let it out that it ſhall ſurround the ground of my neighbour. Another exception was taken for not purſuing the preſcription; For he does not ſhew that the place, where the cutting was alledged, was between them two mills, whereof he makes mention; Yet adjudged contra querentem. And afterwards, this judgement was reverſed by errour; becauſe he had made his preſcription local, and that ought to be purſued: But for the overflowing after the letting out, It was by all held, that it is not puniſhable. *Mich. 4 Car. Com. Banc.*

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THomas Ienkins as heir to John Ienkins brought errour upon a Judgement, given upon an indictment upon the Statute of 1 Eliz. of Recuſancy, and aſſigns this error; For that the Indictment was contra formam Statut. edit. 23 Ian. 1 Eliz. Where the Parliament began 25 Ian. And for that it was held erroneous. 3 Eliz. Dyer 203. Other matter was alleged, for that that the Statute is, that it ſhall be taken before Juſtices of the Peace, or Gaol delivery. The Indictment was before the one, and the conviction before another: But that was thought a ſmall matter. And it was held by the Juſtices that the heir might have a writ of Error upon ſuch a Judgement. As upon execution of a Statute, after the death of his father. It was objected that he brought error as heir, but does not ſhew how he is heir. But nothing is anſwered to that. 1 Liv. 206

Keene againſt Cox.

IN an action upon the caſe brought by Keene, for ſaying, He is falſly forſworn before the Juſtices of Aſſize between A. and B. Adjudged that it lies.

Mercer & Ux. againſt Cardock & Ux.

MErcer & Ux. brought debt againſt Cardock and his Wife as Adminiſtrators of one Tox. And upon plene adminiſtr. pleaded: The Plaintiff replies, that they had aſſets to ſatisfie the aforeſaid Defendant, (whereas it ſhould have been Plaintiff.) And becauſe that it was but the miſpriſion of the Clark, It was held that it might be amended, the record now being brought before them by errour.

Calthrop againſt Allen.

IN Debt the demand was of 19 l. 17 s. and declares upon the ſeveral contracts, and ſhews the certainty upon every of them, which being caſt up amounted to 20 s. more than was demanded. And becauſe that he does not ſhew how he was ſatisfied of the remnant, It was held, quod nihil cap.

Goodridges Caſe.

AN Indictment of Murder was brought againſt Goodridge, and this exception was taken, becauſe that the Indictment was: That the ſaid Francis who was murdered ſuch a day apud quondam Down, vocat. Weſt- *ant. 75*

Mich. 4. Car. Com. Banc.

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Mich. 4 Car. Com. Banc.

Kel. 100 48. 28 Dy. 69. a 4 fo. 41

Westmea Downe in the County of Hampton, insultum fecit, & quod ibidem habuit & tenuit quoddam gladium in his right hand, & prædict. Franc. percussit, and does not say ibidem percussit; And therfore naught: For it is not of necessity to be intended, that the percussion was at the same place. Also he said, whereof instanter obiit, that is no certainty, but by argument that he died in the same place. And for these faults, and because it was Body for Body. It was ruled that the Indictment was insufficent.

Braces Case.

If a Feme sole Executrix of a term, mary him in the Reversion, and dies, the term is not drowned, but the Administration of it shall be committed. Otherwise perhaps if she had purchased the Reversion; And it was the Case of one Owen, That if the Debtee mary the Debtor; That the Debt is not gone, but the Administrators of the Feme shall have it.

The Marquess of Winchesters Case.

The Marquess of Winchester prayed a Prohibition, and the surmise was, that whereas the late Marquess his Father had made the three Lamberts his Executors, which were his Bastards. He also devised that they should sell as much of his Lands as should amount to 100000 l. and does not limit any imployment of the mony inde proveniente. And also that whereas by the Statute of 34 H. a man de non san memori is unable to make a Will of his Land. And that the Marquess at the time of the making of the Will, was not of san memori. And it was held by the Court, that although Land be not a testamentory thing whereof the Spiritual Court ought to intermeddle with. Yet being conjoyned in the Will with the Goods, they cannot do any thing with the one, without the other. Therefore a Prohibition shall be granted. Because that for the non compos mentis, it is more fit to be tryed in our Law. And if cause be, a Consultation shall be granted for part (scil.) his Goods again. And such a Prohibition was in Case of Lloyd against Lloyd.

Munday against Martin

Munday brought an Action upon the Case against Martin. And declares, That whereas at the request of the Defendant in November, delivered to him and his Father, 30 Kerseys for which the Defendant assumed to pay 40 l. to the Plaintiff; The one half in hand, and the other half a year after. Upon non assumpsit pleaded, It was found by verdict, that the delivery was made to the Defendant in August 31 next before the November mentioned in the Declaration. The Question if that will maintain the count or not. Ward, That it will, for the delivery in August, is the delvery in November. As upon payment of mony upon an Obligation before the day, is a payment at the day. And then if he does not pay it within a year after November, he does not pay it with a year after August. Richardson on the contrary. For that cannot be intended the same promise. For upon such a variance the Defendant may wage his Law. And so it is if a man declares upon Debt of one day, and the Deed bears date at an other day. Also it is, that the delivery was to the Defendant and his Father, and it is found that it was to him only. So that that cannot be intended to be the same Consideration: Upon another Cause upon the Declaration he cannot have Judgement. For it is in consideration

ſideration, quod deliberatiſet which is in the Preter tence, and therefore naught, As 10 Eliz. Dyer 272. In conſideration that he was bayl for his Servant, the Defendant aſſumed, Not good. 37, 38 Eliz. Between Gereny and Goteman, in Conſideration quod dediſſet duas, &c. he promiſed to pay 10 l. at the day of his mariage. Held no Conſideration. Crook, To the Caſe of the variance of the date contained in the Deed, There it varies from that which is his warrant. And the date in November cannot be the date in Auguſt; Nor on the contrary. The delivery raiſes the Conſideration, and the time is not material as to the Deliberatiſet. It was one Warthingtons Caſe, That where in conſideration that you will ſtand my bayl, I will ſave you harmleſs. A good Conſideration. Hutton, For the delivery, the time of the contract is not materially neceſſary to be ſhewn for certain; But the day of the payment ought not to be miſtaken, as it is here; For if the delivery was in November, the payment ought to be in November too. But it appears by verdict, That the delivery was in Auguſt, And then ſo the payment ought to be. And then conſequently the day of payment is miſtaken. Yelverton, The Plaintiff cannot have Judgement. For then he might charge the Defendant again, upon a delivery in Auguſt. Atthowe, If upon an Obligation the mony be paid before the day of payment, It is a payment at the day, if the Obligee dies not in the mean time. But I do think that if he dies before, that payment cannot be pleaded in an action of Debt brought by the Executors againſt him. Sed adjournatur. *Mich. 4 Car. Com. Banc.*

Sir John Spencer againſt Scroggs.

SIr John Spencer brought Debt againſt Scroggs, who pleads per minas. The Venire fac. was returned, and the Jurors appear; And the Array was challenged by the Defendant for Coſinage between the Sheriff and the Plaintiff. Whereupon a new Venire fac. was awarded to four Coroners who return the Venire fac. and ſubſcribe A. B. C. D. Coronatores. And in the Habeas corpus A. B. C. D. only; And Judgement was given; And upon that Error, It was argued, that does not lye. Firſt, For that it is aided by the Statute of 18 Eliz. That no Judgement ſhall be reverſed after Judgement for an inſufficient return. Alſo as it appears by 8 H. 6. Such a Return at the Common law, made by the Sheriff, ſhall be good, although he was not called Sheriff. But that Law was afterwards changed, And only Sheriffs, and Bayliffs of Franchiſes was provided for. By which Coroners were not in. Hutton, The Statute of 18 Eliz. extends to inſufficient matter of the Return; But does not intend to toll the Statute of York. He ſaid alſo, that he thought it was not requiſite at the Common law, for the Sheriff to put his name of Office upon the back of the Writ. But he demanded how it might appear, that they are Coroners, if they are not named ſo. Crook, It hath been adjudged that, Coroners ought to put their name of Office; And their names are parcel of the Return. So that defective inſufficiency is remedied by the Statute of 18 Eliz. Richardſon, Without putting their names, it does not appear that they are Coroners.

Luvered againſt Owen.

HE declares upon the Statute of E. 6. for tithes; and an exception was taken. For that, that it was ſaid tam pro dom. rege quam pro ſe ipſo. But it was affirm'd to be good, For the King is to have a

Fine.

Mich. 4 Car. Com. Banc.

Fine. Hutton, If an Action be brought upon the Statute de ſcandalis magnatum; The Plaintiff may declare tam pro domino Rege quam pro ſe ipſo. And ſo upon the Statute of Hue and Cry. It was objected, that one Tomlins Caſe was adjudged to the contrary. But that Caſe was, Becauſe that he demanded in this manner, and the Statute when it ſays, that he ſhall forfeit, it ſhall be intended to him who had the loſs. So it could not be demanded for the King. And at length it was adjudged, that the Declaration was good.

Harding againſt Turpin.

IT was agréed by Hutton, If a Copyholder makes a leaſe for years, to commence at Michaelmas; it is a forfeiture preſently, None gainſaid it.

Hutchinſon againſt Cheſter.

AN action upon the caſe was brought againſt Cheſter, And declares how the Plaintiff was in doing of certain buſineſſe for the Defendant. The Defendant ſaid to him, Do it, and I'll repay you whatſoever you lay out. And ſhews that he had expended 4 l. and does not ſhew in certain and particular circa quid. And for that cauſe it was held naught.

Read againſt Eaglefield.

IN debt by Read againſt Eaglefield, and others, who were Sheriffs of Briſtowe: The caſe being that they being Sheriffs, took the Plaintiff by a Capias ad ſatisfaciend. and detained him in priſon, untill the party Defendant, and now Plaintiff paid the money to the Sheriff. It was held that that was contrary to his warranty, which is in a quod habeat denarios hic in curia. And for that he did not ſo, he is chargeable to him that was in Execution.

Stone againſt Walſingham.

STone libels againſt Walſingham in the ſpiritual Court, and he pleads an agréement, that for five years, he ought not to ſet forth his tithes but to pay for them 6 s. 8 d. upon which matter a prohibition was granted. Richardſon, you ought not to have a prohibition. A leaſe for tithes ought to be by deed; but by way of contract it is good for a year only without deed. Upon the Book M. 26 H. 6. But for 40 or 5 years by parol, ſuch an agreement is not good. Richardſon, May a Parſon bargain and ſell his tithes happening 4 years after by parols. Yelverton, It has been ſo adjudged in many Caſes in the Kings Bench, and the difference is, where it is by way of demiſe, and where by diſcharge. Hutton, The reaſon why it is good for years is, for that that the contract moves ſeverally. But by way of demiſe between Parſon and Pariſhioner it is not good. And Weſton and Biggs caſe, where it was reſolved. If there was an agréement made between Parſon and Pariſhioner for diſcharge for tithes, for years, it was good without deed: otherwiſe if it be for life. Davenport, not. Richardſon, Then for more than a year that contract is void: And you cannot bargain and ſell the profits of beaſts which a man hath not in his poſſeſſion now; but for thoſe which he hath in his poſſeſſion, he may ſell any profits. Quod conceſſum.

Litman

Mich. 4 Car. Com. Banc.

Intr. 4 Car. rot. 670, or 870.

Litman againſt Weſt.

LItman brought an action upon the caſe againſt Weſt for words. And he declared, he being an Attourney, &c. and colloquio habito between them concerning his office. The Defendant ſpoke theſe words. He is a Cozener, and hath cozened me of 20 s. And Serjeant Henden objected, that the words were not actionable. For that, that they are too general. And although they had Communication of his Office, As Attorny. Yet when the words were general, and might be applyed as well to other things as ſuch as touch his place; yet for that, &c. As if one ſaps of an Attorney, Thou art a Common Barrettor. Is not actionable. And it was adjudged where one ſaid to a Wheeleright, Thou art a Couſener and haſt couſened me of a pair of Wheeles. Is not actionable. And Sir Wil. Fleetwoods Caſe. One ſaid of him, He is a Couſener, and hath conſened me in entring the Kings Accounts. So here he might couſen him of 20 s. twenty ways and not as Attorny. Richardſon ſaid, the words were actionable. Some words ſpoken of ſome men would bear an Action, although the ſame words ſpoken of another would not. As the Caſe of an Attorny eſpecially, as the Caſe is laid here: And he had ſpoken of him as an Attorny. Then it ought to be taken that he was a Couſener in his profeſsion. If one ſaid of an Attorny, Thou art a Couſener, and haſt delivered couſening Bills, &c. If it had been laid here that he had been an Attorny for the Defendant. It would be actionable. And this Caſe is more ſtrong than Birchleys Caſe in Coo. lib. 4. One ſaid of Chomely Recorder of London, That he could not hear but of one ſide of his head. And that was adjudged actionable. And that being ſpoken of an Attorney there, it would bear an Action, One ſaid in the North Country, That one was a Daffidowndilly, and adjudged actionable; Becauſe that the word there uſed expreſſes an Ambidexter, being a flower of party colour. Hutton ſaid, That the action would lye. In one Gardleys Caſe, who was an Attorny, One ſaid of him, he was his Attorny, and he had couſened him. So of a Goldſmith. Thou haſt couſened me, and ſold me a Saphire for a Diamond. Theſe words are not actionable, becauſe that the Goldſmith himſelf might be deceived in the ſtone. And here theſe words ſpoken of an Attorny, cannot be otherwiſe but to diſgrace him in his profeſsion. An action in the Kings Bench. Thou art a couſening Knave Coroner, and adjudged actionable. One ſaid of a Lawyer, He hath no more Law than an Horſe, an action lies: for both are applyed to his profeſsion. Yelverton agreed, that the Jury had found that the words were ſpoken of him as Attorny; For they have found the words in the Kings Bench. The Caſe was, An Inne-keeper, and another were in communication and he ſaid to him, No man comes to thy Houſe, but thou couſeneſt him. And adjudged actionable. And ſo Judgement was given for the Plaintiff.

Middleton againſt Sir Iohn Shelly.

MIddleton recovers in Debt againſt Sir Iohn Shelly, and had Execution. And afterwards Sir Iohn purchaſes the Land of the Plaintiff. And long after the Execution was ſued by Elegit, and that land extended. But before Livery by any, the Plaintiff dies; yet the Sheriff returns that he delivered the Land. Hutton, We will not credit that he is dead. But you bring a Writ of error. Yelverton agreed, The re-

Mich. 4 Car. Com. Banc.

turn of the Sheriff. Richardſon the return of the Sheriff does not prejudice a third perſon although it concludes the parties. And if the Execution was made, if the party brings an Ejectione firm. Whatſoever the Sheriff returnes, his proceedings ought to be proved legal. See if the Sheriff deliver poſſeſsion where the partie is dead, if any thing lies: It was urged to have a writ of reſtitution. But where the Sheriff gives poſſeſsion contrary to the rule of the Court.

Coventries caſe.

In Coventries caſe before, Aſhley brought a Copy of the ſentence given in the high commiſsion Court: which was, that the parties ſhall be excommunicated, and be fined 30 l. and impriſoned. Whereupon he prayed a prohibition, Richardſon If they had gone but to excommunication they had been well. Yelverton Juſtice, they have power by fine, and impriſonment in ſome caſes; but here where the party grieved may be fined at, Common law, not. For if the party be fined in the high Commiſsion and be afterwards indicted &c. he cannot plead this. But e converſo if he be indicted, and afterwards ſued there, he may plead that in the high commiſsion Court. Richardſon, they that deny their power to fine and impriſon, ſay that they may ſo proceed only in two caſes (ſcil.) of Hereſy, and and incontinency of Prieſts: which is alſo by the Statute of 8. H. 3. 7. But eccleſiaſtical cenſure by excommunication is more grand, if it were ſo regarded. And they may enjoyn penance, and put the party in priſon until he does it. But before he granted a prohibition he would have the parties preſent. Harvey, They in the high commiſsion Eſtreat their preſentments, and then the proſecutor ſhall have the third part in ſuch unreaſonable fines. Which ought not to be permitted by us, &c.

Bramſton the Law at firſt gave them power to fine and impriſon, in caſes which were not fineable before by the Common law, to ſtrengthen their juriſdiction. But that was fineable before. But afterwards a prohibition was granted as to the fine, but not for the impriſonment; But for that he ought to have his habeas corpus.

The King againſt the Archbiſhop of Canterbury, and Thomas Pruſt Clark intratur, trin. 4. Car.

The King brought a quare impedit againſt the Biſhop of Canterbury, and Thomas Pruſt, for the advowſon of the Church of Iſlinſtock, in the County of Southton, and recited the Statute of pluralitpes; and afterwards declared that the Marques of Wincheſter was ſeiſed of the Rectory, to which the Advowſon of the Vicarege belonged: and that he made a leaſe of it to Sr. Auſtine Mayn; He preſents John Shelton Clark 12. Jac. and the Vicarege was above the value of 8 l. And Shelton 15 Jac. took the Vicarege of Holcumbernel, which was with the cure of Soules, alſo by which the firſt became void, and ſo remained until 3. Car. And being void the King preſents to it, and was diſturbed. The Archbiſhop claimed nothing but as Petrapolitan, during the vacancie of the Biſhop of Wincheſter. And Pruſt pleads in bar, that he is Parſon imparſonee from the preſentation of Foyle, who conſeſt the Statute, and the Demiſe for years from the preſentation of Shelton: and that he took a ſecond benefice with the care. But he ſaid that he continued poſſeſsion as Incumbent, and then pleads the generall pardon of 21. Jac. a quare impedit is not excepted out of it. And that Shelton continued poſſeſsion after the Parliament, and the reſigns to Foyle and preſents him. Pruſt replyes and confeſſes

ſeſſes the pardon, but that there is an exception of all titles and actions of quare impedit, other than ſuch titles and actions of quare impedit, as his Majeſty hath or may have by reaſon of laps incurred above three years paſt for or concerning any benefice or Eccleſiaſtical living is, or at the laſt day of the Seſsion of this Parliament, ſhall be in actual poſſeſsion, by the preſentation of any Patron, or collation of any ordinary. Upon which it was demurred. Atthowe for the Plaintiff, That Shelton here is incumbent in poſſeſsion by preſentation or Collation by By the Stat. the preſentation & induction of that is void. In Coo. 41, 51. There is in Hollands caſe, a difference between voidance by act of Parliament, and void by Eccleſiaſtical Law. For before the Statute, by the taking of the ſecond benefice, the firſt Church was void. But not ſo that the lapps incurred upon it. Greens Caſe, If the Biſhop collate before the 6 months incurre, the Collatee is Incumbent, but the Patron may preſent at any time after, for that fills the Church, but not againſt the Patron, and hinders that no laps may incurre to another. In Sir Henrie Gawdies caſe for the Church of Walſocken. The Church there became void, and within 14 daps after, The King preſented one to it jure prerogativ. ſuæ. The preſentee continues poſſeſsion above 30 years, and then the Patronage and the Advowſon came to Sir Henry Gawdy, the Church is void, and the King preſents again, and was diſturbed by Sir Henry. For that the King brought a Quare impedit. And adjudged that the preſentation of the King within the ſix moneths, was not an uſurpation. But if he had preſented in his own right, there ſhould have been an uſurpation. When a title by laps is in the King, if any preſent, the King may remove him during his life, by Quare impedit. All this appears by Bukervills caſe; but if the Incumbent die, the term of the King is gone; but if he reſign not, but the King may preſent during the life of the Incumbent, And that was a grand inconvenience, that after ſo long poſſeſsion in that manner the Incumbent may be removed by the King. And for that purpoſe was the Statute in the firſt clauſe of the exception made. That the King intended to pardon, it would be a wrong to him, and an exception ought to be of the ſame nature. The taking of the ſecond benefice, is not a tort, and therefore a title of the Quare impedit accrewed to the King. As for the pluralities, the words of the Statute are, that it ſhall be void, as if he was naturally dead, and therefore it is meerly and actually void. If a man takes a ſecond benefice and dies, iſſue ought to be taken whether the firſt vacabit per mortem. And it was found that, not; For it was ſold before the death of the Incumbent. Yelverton If he took the ſecond benefice, yet he might have the tithes of the firſt. And there are words in the Statute, which ſhall be conſtrued more beneficially for the ſubject.

Mich. 4 Car. com. Banc

Pinſons Caſe.

PInſon was collated, inſtituted and inducted by the Biſhop of Exceter's Patron, Doctor Hall. The Biſhop collates another pretending that the firſt Incumbent had taken a ſecond benefice, whereupon the firſt was void, or revera the the firſt Incumbent had a diſpenſation. And notwithſtanding that the Biſhop ſequeſters the benefice; Upon diſcovery whereof to the Court, a prohibition was granted.

Nihil.

WHen a nihil is upon a writ of Covenant, pro licentia concordandi ſecundum conſuetudinem antiquam, only 6 s. 8 d. ought to be ever paid for the poſt fine, which is in caſe of the Lord Keeper, and ſome other who are excuſed of a Fine, pro licentia concordandi.

Mich. 4 Car. Com. Banc.

Bragge and Briſtowes Caſe.

IT was agreed by the Court, that where there was a difference between one, and another who had married his daughter, which difference was referred to a friend to compound. And he ordered that the Father and the Son to enter into a bond to pay ſo much to the Daughter; And afterwards the Son promiſes to do it: That here might be a ſufficient conſideration between Father and Son for the making of that promiſe.

Corporation Court.

IT was agreed by all the Juſtices, that in a Corporation. If the Defendant pleads a forein plea, which is collateral. As if he be ſued in debt upon an Obligation, and he pleades a releaſe made in a place out of the Juriſdiction of this Court, it ought not to be received without Oath, &c. But if in Covenant or debt for money to be paid at another place, he pleads payment accordingly, or the Covenants performed in the place limited, which was out of the Juriſdiction, it ought to be received without Oath, quod not.

Double delay.

By the courſe of the Court double delay cannot be allowed; as if the Defendant in debt plead, that the Plaintiff is a Recuſant convicted, and had a ſpecial imparlance, afterwards the Plaintiff conforms, The Defendant cannot plead Outlawry in the Plaintiff.

Iohn Felton's Caſe.

MEmorand. quod Thurſday 29 die Novembr. 1628. Iohn Felton was arraigned in the Kings Bench, for the murther of George Duke of Buckingham. And the Juſtices of the Common Bench demanded of the Serjeants of the King, who were preſent in the Kings Bench, what was done with Felton. And Aſhley anſwered, That he had confeſſed the fact, and that the ordinary ſentence of death was given againſt him. But they marvelled that for ſo notorious offence, the ſentence was not, that he ſhould be hanged in chains. Yelverton, That any other ſentence than the ordinary ſentence cannot be given. But after that he is dead, his body was at the diſpoſition of the King, which was not denyed by the other Juſtices.

Turner againſt Hodges.

TUrner brought Treſpaſſe quare clauſum fregit againſt Hodges. The Defendant ſaid that loco in quo &c. is Copphold, and that the Lord Dudley is ſeiſed of the Mannor of Sedgley, and granted the Copphold in Fee to Roger Turner, and he makes a Leaſe to the Defendant Hodges for a year. The Plaintiff replies that there is cuſtom within that Mannor. If a Coppholder makes a leaſe without licence of the Lord for a year, and dies within the term, it ſhall be void againſt the heir. And upon the iſſue of Nul tiel record, it was found for the Plaintiff. And Athowe prayed Judgement, and ſhews that the cuſtom is good, and not contrary to reaſon. 4 rep. 26. It was reſolved that leſſee of a Copphold, without licence, for a year, may maintain an Eject. firm. for his term is warranted by the Law, by force of the general cuſtom of the Realm. But that ought

1 Lo. 249

ought to be intended by the cuſtom within every Mannor within the Realm, Whatſoever a Copiholder does is by Cuſtom. The Caſe here is that it ſhall be void by the death of the Lord which is an Act of God; That was, that if Copiholder made a Leaſe for years, and afterwards aliens: that to be void againſt the Alienee would be unreaſonable. 39 Eliz. There was a Caſe referred to the Judges out of Chancery which was debated in Sergeants Inne. Littleton, 59 b. Armeſtrong Lord of a Mannor preſcribes that a Copiholder upon the change of every Lord; ſhould pay a Fine. But by all the Judges it was ruled a void Cuſtom; For the Lord might change his Mannor every day. But if it had been, That after the death of the Lord he ſhould have a Fine. That is a good cuſtom For it is the act of God. So in our Caſe, the cuſtom is void againſt his Heir, which is by the act of God. In ſome Caſes a cuſtom alters the nature of a Free-hold land. 5 Rep. 84. Perrymans Caſe. A Feoffment ſhall not be good untill it be preſented in the Court of the Mannor, a good cuſtom. If a free-hold eſtate may be controlled by a cuſtom a multo fortiori a Copi-hold eſtate. Barkley argued on the other ſide. Although it be found for the Plaintiff. Yet if the cuſtome be void; a void cuſtome is no cuſtome. And for that it is ſaid in the Earl of Leceſters caſe. That a void cuſtome cannot be confirmed by Act of Parliament. And that is a void cuſtome. We ought to conſider the nature of a Copyhold Inheritance; By the Common law it is but an Eſtate at will: But the Common law ſo takes notice to eſtabliſh it by a cuſtome. That there may be poſſeſſio Fratris of it, and he may have Treſpaſs againſt his Lord. If Tenant at will be out-lawed, his Eſtate is determined. But Copyhold is not determined or forfeited by Out-lawry. As it was adjudged, 44 Eliz. So that the Law takes notice of it as of an other Eſtate of Inheritance. Where an Heir after his death may enter as Heir at Common law, and have Treſpaſs; becauſe that it deſcends. At Common law he had power to make a Leaſe for a year. For it is not the cuſtome of the Mannor that he may make ſuch a Leaſe; For then it is pleaded, If a Copiholder makes a Leaſe for divers years without alleging a cuſtome or Licence of the Lord, he cannot maintain an Ejectione firm. againſt his Lord, but perhaps againſt a Stranger. It may be, then if it be the very Law, if he may make a Leaſe for one year, if this cuſtome be good; It will be contrary to the very liberty of the Eſtate, 19 Eliz. Dyer Solomons Caſe. Cuſtom, that Tenant in Fee-ſimple ſhall not make a Leaſe for more than 5 years is void. So Littleton ſays, That a Condition that the Feoffee ſhould not alien, was void. And a Condition that Tenant in tayl ſhould not ſuffer a Common recovery is void. Becauſe that it reſtrains that Liberty which is annexed to the Eſtate. And for the difference between the Father and the Heir in our Caſe there is not any difference; For the Heir is all one with Father and in loco patris. For he might have Treſpaſs by diſcent of a Copihold. Sir William Herberts Caſe. And then if the Father ſhall be bound by the Leaſe, ſo ſhall the Heir. Richardſon ſaid, That Judgement ought to be given for the Plaintiff. Copihold as it is created by Cuſtome, ſo in all it is guided by Cuſtome; For at the Common law a Copiholder could not make a Leaſe for a year, But becauſe that it is a general cuſtome of all Mannors in England: For it is not but a meer Eſtate at will by the Common law. Then this cuſtome is not againſt the Liberty of the Eſtate. For a Cuſtome inables that the Leaſe, and a Cuſtome ought to deſtroy it upon a Contingency as here by the death of the Father; For that the Lord may know his Tenant. And therefore the Caſe is reaſonable, and not to be compared to the caſe of a Freehold in Dyer. And yet a Freeholder may be reſtrained by cuſtome;

Vide. 4 Car. Com. Banc.

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A Freehold may be reſtrained by Cuſtom.

Mich. 4 Car. Com. Banc.

As antient demeſn, which he paſſes by the delivery of a Turf or a pair of Gloves, and it is not convenient, for it is at the peril of him who takes the Leaſe. Copyholder makes a Leaſe for a year. But if he dye within the year, his Heir within age, it ſhall be void againſt the Lord. So that the Lord during the nonage ſhall have the Copihold to hold for his Services is a good Cuſtome. And ſo in our Caſe. Hutton agreed, That at the Common law it might be reſtrained by cuſtome. And a Condition, that a Leaſe for 3 years ſhall be void, if the Leſſor dye during the term, is a good Condition. Without doubt the cuſtome is as old as the Eſtate, then it is as good to abridge the Eſtate, as to the other to create it is: It is reaſonable too. For the Lord ſhould have his Tenant in poſſeſsion, by which he may the better pay his Fine. But if the Leaſe be made by Licence of the Lord, It is a Confirmation. For that, if the Copiholder makes a Leaſe for years with Licence, and dies without Heir, The Lord ſhall not avoid the Leaſe. In ſome place the cuſtome is, If a Copiholder dies before Candlemas, the Executor ſhall have it for that year, to remove and diſpoſe the Copiholders Eſtate; Cuſtome in this Caſe you ſee tolls the Heir. And he agreed the Caſe and difference cited by Atthowe out of Cook, Littleton. Harvey agreed, That it is a good cuſtome for the Lord, and for the Tenant; For the Lord to know his Tenant, and for the Tenant to have the Eſtate, and pay the Fine. Yelverton agreed alſo, the Leaſe for a year is in it ſelf made by cuſtom, And the ſame cuſtome may confound it; For there is a concurrence of others, or one may controll another. 21 H. 7. 14 H. 8. A Leaſe for years, provided the Leſſor may enter at his will, that is a good leaſe, determinable at will, being uno flatu ſo. So in our Caſe; But it is done, that a Copiholder within the year ſurrenders his Copihold, that the Leaſe ſhall be void. That is an unreaſonable cuſtome. In the Kings Bench, It was adiudged, A Copiholder makes a Leaſe for years by Licence, and the cuſtome, if the Leſſee was not in poſſeſsion at the time of the death of the Leſſor, that it ſhall be void. Leſſee aſsigns that over, and the Aſsignee holds it; For cuſtome ought to be taken ſtrictly. And he agreed the Caſe put by Hutton, of an Executor; And the difference that againſt the Leſſor it ſhould not determine; And the reaſon put before. And ſo judgement was given for the Plaintiff.

Stone againſt Walſingham before.

The caſe was again moved in Court, which was that they agreed de anno in annum ſo long as the one ſhould be Parſon, and the other Pariſhioner, ſi ambobus partibus tam diu placuerit, he ſhould retain his tithes for 6 s. 8 d. per annum. And Richardſon Juſtice ſaid, and it was not denied, that the ſuggeſtion is naught for the incertainty of it; and a Prohibition cannot be granted upon that. For the words de anno in an. make an eſtate for a year. And the nert words make an eſtate for life, & the laſt but an eſtate at will: & what ſhall be traverſed here. It is ſeen that for years it is good without Deed, but not for life; And if it be but at will; when the other demands his tithes, the Will is determined. But at an other day, the ſuggeſtion was made, That he made ſeverall agreements with his Pariſhioner, that he pay 6 s. 8 d. for his tithes for 4 years. And then a Prohibition was granted. Harvey ſufficit, If an agreement be proved for thoſe 4 years.

Wil-

Wilſon againſt Peck.

Mich. 4 Car. Com. Banc.

WIlſon brought an action upon the Caſe againſt Peck, and declares; That the Defendant in conſideration that the Plaintiff ſhould be his ſollicitor in ſeveral ſutes depending againſt him, in this Court, affirmed that he would give to him for his pains as much as he deſerved. And he ſaid that he deſerved five marks: And upon an Aſſumpſit pleaded, it was found for the Plaintiff. And it was moved in arreſt of Judgement, that the conſideration was againſt Law; becauſe that it was maintenance. But Henden on the contrary. And that it was lawfull to have a ſollicitor. 5 H. 7. 20. There it is ſaid, that a man may juſtifie in maintenance that he was a ſollicitor. And the fees of an Officer, 3 Iac. cap. 7. gives ſatisfaction in that caſe. It was ſaid that a ſollicitor is not a man known at the common law, but an Attourney, and had his fees ſet out by the Law. 9 Eliz. Dyer. Onelyes caſe. But Munion and Manwood held that it was maintenance in a ſollicitor to proſecute and pay money for another. And Dyer did not oppoſe that opinion. Paſ. 13, Iac. Rot. 75. Com. Banc. Solomon Leeches caſe. An Atturney of this Court brought an action upon the caſe for ſollicetting of ſutes. And there it was conceived, that it was an ill conſideration, and could never have judgement. But Richardſon ſaid that in Solomon Leeches caſe, he brought an action for the money diſburſed, and not only for as much as he deſerved for his labour; And ſaid that a Sollicitor is a perſon known in the Law. 1 H. 7. And it was one Snowdens caſe. One brought an action againſt him. And he juſtified, that ſuch an one made a title to his Clyents land, and that he was his Sollicitor in the ſuit; And ruled to be a good Juſtification. By which it appears, that a Sollicitor is a perſon known in the Law. And the Stat. 3 Iac. much prevails with him for to be of that opinion. And it would be a miſerable caſe if you would allow no Sollicitors, but Attourneys in the Star-chamber, & Chancery. For there the Attournies will not move out of their Chambers. And alſo it is convenient that Attournies of this Court follow buſineſſes in the Kings Bench. And the caſe was in conſideration that he would be my ſervant, and follow my ſutes, I promiſe him as much as he deſerved: An action will clearly lie here, and a Sollicitor will not alter the Caſe. For he is not but a ſervant. Hutton on the contrary. I may retain a man in my ſervice, he may follow my ſutes, but then he ought to maintain the action upon the Statute. For a Sollicitor is within the Statute, and a Sollicitor of ſutes is one kind of maintenance, and we ought not to allow it. And ſo it was taken in Leeches caſe, That there was no remedy for a Sollicitor, if he had not an obligation. And he ſaid that in the Star-chamber, in the time of Egerton, a Sollicitor was puniſh'd there. Yelverton agreed with him. Harvey ſaid, that the ſame caſe is now depending in the Kings Bench. And the opinion is, that an Attourney or a Counſellor, who had a profeſsion towards the Law, might ſollicite any ſute in any Court, and it is not maintenance; But another perſon not. Yelvert. agreed to that, but ſaid that he ought to ſhew in his Declaration that he is an Attourney. And afterwards the parties agreed, &c.

A Man may juſtifie in maintenance that he was a Sollicitor.

Scire facias againſt the Bayle.

IF a Scire facias be brought againſt the bayle, and Judgement be, that the Plaintiff be ſatisfied out of the lands and chattels of the bayle, and alſo a capias does not not lie againſt them. But if debt be brought, as it may be againſt the Bayle, otherwiſe it is.

Debt be brought againſt the bayl.

Ray. 14. Brow. 65

Plum-

Hill. 4 Car. Com. Banc.

Plummers Caſe.

IF a Recuſant bring an action, &c. and the Defendant pleads that he is a Recuſant Convict, and then the Plaintiff conform, which is certified unde r the Seal of the Biſhop; And upon that, orders that the Defendant plead in chief; and then the Plaintiff relapſes, and is convicted again: The Defendant cannot plead indiſabilitity again, As it was adjudged by the Court.

Sir John Halls Caſe.

SIr Iohn Halls caſe in a quare impedit, It was given for the Plaintiff, who was preſented by the King to a Church void by Symony; That it was apparently proved, that the Plaintiff had a writ to the Biſhop of Wincheſter, who returns before the writ accepted (ſcil.) Such a day, (which was after the Judgement) the Church was full by preſentation out of the Court of Wards, becauſe that a livery was not ſued. Theſe returns, that the Church was full before the receipt of the writs, are always ruled to be inſufficient. For the Biſhop ought to execute the writ when it comes to him. 9 Eliz. Dyer in a ſcire fac. &c. 18 E. 4. 7. The difference here is, That the King preſented, If the preſentee of one without title is admitted and inſtituted, the Patron may bring a quare impedit with preſentation, for it is in vain for him to preſent when the Church is full. But if a common perſon recover, and had a writ to the Biſhop, if the Ordinary return that it is full before of his own preſentment, it is good; As if one recover, he may enter if he will, without a writ of execution to the Sheriff. And in this caſe the ſecond preſentation does not make mention of the other preſentation, or revoke it. But if the Ordinary had returned an other preſented by Symony, under the great Seal; And that the other in that was revoked, that is good. For it is an execution of the Judgement, & may be pleaded in abate of the Writ. But if this return ſhould be allowed by this trick, all the recoveries in a quare impedit ſhould be to no purpoſe. Harvey only preſent, agreed that the Judgement ought to be executed, and that that is a new deviſe. And if the preſentment under the ſeal of the Court of wards was returned, then the queſtion would be, whether the great Seal, or this Seal ſhould be preferred, but the preſentation is not returned. Whereupon they two agreed, That the Biſhop ſhould have a day to amend his return, And not that a new writ ſhould be taken againſt him.

Hill. 4. Car. Com. Banc.

Andrews againſt Hutton.

HUtton Farmer of a Manno, Andrews and other Churchardens libels againſt him for a tax for the reparation of the Church. Henden moved for a prohibition, becauſe that firſt the libel was upon a cuſtom, that the lands ſhould be charged for reparations, which cuſtoms ought to be tryed at the Common law. And ſecondly he ſaid, That the cuſtom of that place is that houſes and arrable Lands ſhould be tared only for the reparations of the Church, and meadow and paſture ſhould be charged with other tares. But the whole Court on the contrary. Firſt, That al-

although a libel is by a cuſtom, yet the other lands ſhall be diſchargeable by the Common law; But the uſage is to allege a cuſtom; and alſo that houſes are chargeable to the reparations of the Church, as well as land. And thirdly, that a cuſtom to diſcharge ſome lands is not good. Wherefore a prohibition was granted. Hil. 4 Car. Com. Banc.

Sir Iohn Halls caſe again.

IT was moved again, and Henden endeavoured to maintain that the return was good. And he ſaid, where the King had Judgement upon the Statute of Symony, The King may chooſe, if he will have the Writ to the Biſhop: For if he preſent, and the Biſhop admits his Clerk, it is a good performance of the Judgement. And admit that the King had a former title, this title remains notwithſtanding that Judgement. And it is not neceſſary to return it. For if the title be returned, it is not traverſable. Henden, If the return was that the Church was full by preſentation of a ſtranger, it is clearly void. Richardſon in Bennet and Stokes caſe, there was a rule, and adjudged that if a Clerk be admitted pendente lite ex præſentatione of a ſtranger, who is not a party at all to the ſute, yet ſuch a plenarty returned, is not a good return. And upon ſuperinſtitution, their titles ought to be tryed. Yelv. The King preſents one under the great ſeal of the Court of Wards, this ſecond preſentation is not a revocation of the firſt, but it is void. Richardſon, And ſo is the ſecond void, becauſe the King is not fully informed of his title; but if he be, then perhaps it would be otherwiſe. Henley, One is Patron, and a Stranger preſents, who has not title by Symony; all is now void. But the King is not bound to preſent by Symony, but may preſent as Patron. Yelverton and Richardſon, The Biſhop ought to obey the Writ of the King. And when the Clerk is inſtituted, that the incumbents may try their rights in treſpaſs in Ejectione firm. or otherwiſe the parſon who recovered ſhould be ſhut up.

Dawthorn againſt Sir Iohn Bullock.

IN a Replevin for taking of his goods and Cattel. The cattel and goods were delivered in pawn to the Defendant for mony, and the Plaintiff did not pay the money at the day, yet in the abſence of the Plaintiff coming with the Sheriff, who replevyed them. The Defendant avows for the cauſe aforeſaid. And Atthow demurred upon the avowry generally. For that that it appeared that the Defendant had a ſpecial property in the goods, and therefore he ought not to avow, but juſtifie the ſame. Richardſon and Yelverton being only preſent, awarded that judgement ſhould be for the Defendant; becauſe that now by the Statute, they may give Judgement upon the Right; and the Avowry is but a form, upon which the Replevin is barred; But he cannot have a returno habendo.

The Counteſſe of Purbecks Caſe.

HEnden moved for a prohibition for the Counteſſe of Purbeck, who was cenſured in the High Commiſſion Court for Adultery with Sir Robert Howard, ſon to the Counteſſe of Suffolk, and the ſentence there was, that ſhe ſhould be impriſoned without bayl or mainprize, until ſhe found ſecurity for to perform the ſentence, and ſhe was fined 4000 marks. But Henden alleged, that they had not power to inflict ſuch puniſhment; For the offence is ſpiritual, and the puniſhment temporal. And the High Commiſſion had not power to impoſe a fine, and impriſon for Eccleſia-

Hil. 4 Car. Com. Banc.

ſtical cauſes. For the liberty of the Subject is Precious. And therefore the cenſure in the Eccleſiaſtical Court ought to be only by excommunication; before the Statute of 1 Eliz. there was not any queſtion of it, as appears by Articuli Cler. And the Statute does not make alteration of it, but only in the things there named. Hil. 42 Eliz. Smiths Caſe, who was cenſured for Adultery with the wife of Stock, and cenſured as here. And an Houſe was broken to apprehend, and a Prohibition was afterwards granted, for that, that nullus liber homo, &c. ought to be impriſoned, &c. without lawful proceedings. Secondly 23 H. 1. 8. appears the particular courſe of proceeding in Spiritual cauſes. Richardſon, The firſt part of the ſentence is not part of the puniſhment. But that ſhe ſhall be taken untill ſhe gave ſecurity, &c. And it is not but agreeable to the Eccleſiaſtical courſe. For if ſhe be taken by a Writ de excommunicat. capiendo, and then to perform the ſentence or make agreement for the ſecond part; It is expreſs within their power. Brampſtone ſaid, ſhe is a feme Covert, and part of the ſentence is impoſsible (ſcil.) that ſhe ſhould pay the Fine; and then by that means the impriſonment would be perpetual. Yelverton, They cannot impriſon without bayl. Their Commiſsion does not give them ſuch power. And at another day Richardſon ſaid, That it was out of the High Commiſsion, and the Fine eſtreated. For that now no Prohibition may be granted, &c.

Smith et al. againſt Pannel.

SMith et alios Church wardens of Bignel in Eſſex, preſented to the Arch-deacon, that one Pannel was a Rapier and a ſower of Diſcord amongſt his Neighbours; Whereupon the Arch-deacon injoyned him purgation, et ſur motion the Court granted a Prohibition; for this Caſe belongs more perhaps to the Leet, than to the Spiritual Court, unleſs the rapling were in the Church, or any wales tending to the Eccleſiaſtical rights.

Wats againſt Conisby.

ELizabeth Wats Wife of Edward Wats libelled in the Spiritual Court, againſt Jane Conisby for a legacy of 100 l. the Defendant pleaded a Releaſe of Wats the Husband after mariage, and there were no Witneſſes to the releaſe to prove the ſame, in regard they were dead, and therefore it was not allowed, but upon averment of the party, that there were Witneſſes that could prove the Releaſe to be the hand of the party, and that had heard the party confeſs ſo much, that he had ſubſcribed to the Releaſe. Prohibition was granted concerning this averment.

Laſhes Caſe.

IOhn Laſh brought to the Bar by a Habeas corpus cum cauſa directed to the Mair, Aldermen, and Sheriffs of London, who certified the cauſe, as followeth, That there hath been a Court of Orphans time out of mind in London, and that the cuſtome hath been, that if any Freeman or Free-women die leaving Orphans within age unmaried, that they have had the cuſtody of their Bodies and Goods; And that the Executors or Adminiſtrators have uſed to exhibite true Inventories before them, and for the Debts due to the deceaſed, to become bound to the Chamberlane to the uſe of the Orphans in a reaſonable ſum, to make a true account upon Oath of them after they be received; And if they refuſe to become bound, to commit them till they become bound, and then ſheweth that one

Joan

Joan Cather Widow, being a Free woman Fiſhmonger died, leaving divers Orphans, and that Iohn Laſh was Adminiſtrator and had exhibited an Inventory of 1000 l. debt unreceived, and was required by this Court to give bond in 1000, who refuſed per quod. And it was alleged for the Priſoner by Sergeant Athowe, that he was already bound in the Eccleſiaſtical Court to make account, and ſo he ſhould be twice bound, alſo he was inform'd that there was no ſuch cuſtom for Widows of Freemen; But the Court reſolved, that they could not examine the truth of the cuſtom, but the validity of it, and they held it reaſonable, if it were true, which is returned, but if the Eccleſiaſtical Court would impugn a lawfull cuſtom, the Court would grant a Prohibition. Hil. 4 Car. Com. Banc.

Scot againſt Wall.

SCot moved to have a Prohibition, that whereas he had 20 acres of wheat, and had ſet out the tenth part for tithe, the Defendant pretending that there was a cuſtom of tithing that the Owner ſhould have 54 Sheaves, and the Parſon 5, and ſo he ſued for tithes, for that there was no ſuch cuſtom, for the Court ſaid, that the modus decimandi muſt be ſued for as well in the Eccleſiaſtical Court as for the tith it ſelf; and if it be allowed between the parties they ſhall proceed there, but if the cuſtom be denyed it muſt be tryed at the Common law, and if it be found for a cuſtom, conſultation muſt be granted, if not, then the Prohibition is to ſtand. 2 Inſt 489 3 Bull 241 2 Inſt 103

Farmer againſt Sherman.

IOhn Farmer brought Prohibition, and the Caſe was thus. An Abbot having a Privilege to be diſcharged of tithes quam diu manibus propriis, &c. in the time of E. 4. made a gift in tayl, 31 H. 8. the Abby was diſſolved, queſtion whether upon the clauſe of diſcharge of tithes within the Statute of Monaſteries, the Donee and his heirs ſhould be diſcharged, and held that he ſhould not; for that Statute diſchargeth none, but as the Abbot was diſcharged in the time of the diſſolution, ſo that they muſt claim the Eſtate, and diſcharge under the Abbot; but if by a common recovery, the reverſion had been barred before or after the Statute, it had been otherwiſe.

Napper againſt Steward.

NApper againſt Steward, the Parſon had a Prohibition againſt divers of his Pariſhioners that libelled in the Spiritual Court to make proof by Witneſſes of divers manner of tithing in perpetuam rei memoriam.

Hide againſt Ellis.

A Prohibition for Hide againſt Ellis farmor of the rectory of Stanfield in Com. Berks, q preſcribed that all tenants and occuppers of meadow had uſed to cut the graſs, q to ſtrow it abroad called Tetting, q then gathered it into wind-rows, and then put it into graſs-cocks in equal parts without any fraud, to ſet out the tenth cock great or ſmall to the Parſon, in full ſatisfaction, as well of the firſt as of the latter math: Upon traverſe of the cuſtom it was found for the Plaintiff, q exception was taken, that the cuſtom was void, becauſe it imports no more than what every Owner ought to do, and ſo no recompence for the 2 maths, But the Court gave Judgement for the Plaintiff, for diſmes naturally are but the tenth of the Reve-

Hil. 4 Car. Com. Banc.

new of any ground and not of any labour or industry; where it may be divided as in grass, it may, though not in corn, and in divers places they set out the tenth acre of Wood standing, and so of grass, and the Jury having found out his form of tithing there it is sufficient, and the like Judgment upon the like custom in the Kings Bench, Pasc. 2 Jac. rot. 191, or 192. inter Hall & Symonds.

Int. Hil. 2 Car. rot. 2445. Bells Case.

An action of Debt was brought by Bell upon an Obligation against one as heir of the Obligor, (scil.) Brother and Heir. And the Defendant pleads riens per discent, from the Obligor; And upon that issue there was a speciall verdict found, that the Obligor seised of Lands which descended to his Son W. who died seised of the Lands which descended to his Uncle, who was the Defendant. Crawley, Two things are required to maintain the action; Whether the Defendant be heir. Secondly who held lands by descent from the Obligor now is heir at Common law. And now the heir by the Mannor shall be chargeo in debt, as well as the heir at Common law. Dyer 228. All Brothers in Gavelkind shall be charged. 11 H. 7. 12. The heir of the party of the mother shall be charged, and so shall Bastardeign. 4 E. 3. 14. Heir by Borrough-English. And in this Case R. is not heir but by the Mannor. Yet he shall be charged, 32 Eliz. Dyer 368. by 4 the Justices. And the Defendant here had Lands by descent from the Obligor, by which he shall be charged, which was agreed by the whole Court. But by Richardson, It is not sufficient that he be heir in Blood, and heir by the Mannor. But he ought to have also Land to him by descent from the Obligor. But here the Plea is that the Land descended to him immediately. And for that you ought to have pleaded, that the Obligor died, and Lands descended to W. his Son and Heir, who died without issue seised of the said Land which descended to R. his Uncle, as Brother and heir to the Obligor. Quod fuit concessum per totam Curiam.

1 Luthw. 507

Grays Case.

Henden shewed cause that a prohibition should not be granted to the Ecclesiastical Court; where the case was, That one Brother had taken administration, and the other would have distribution of the goods of the intestate; And said, that issues might enforce distribution of it; And it is grounded upon Magna Charta, cap. 18. Where there is a saving to the wife, and the issues, their reasonable part. And upon the same reason that there may be a division between the issues, so there may be between the Brothers, but more remote degrees have no distribution. And it is hard that one Brother shall have the whole estate, and the others nothing. And the Ordinary here is the most indifferent man to make distribution. Hutton, if the eldest son had lands descended to him, and the youngest took Administration, It is reason that the eldest shall have distribution. And by him and Harvey a Writ de rationabile parte bonorum lies only where there is a custom. And they said, if it should be admitted that the Ordinary should distribute to the Brothers; by the same reason he may to more remote degrees; And he declared their opinions, that many terms before they were against those distributions; But they said, That now the Ordinary would have an Obligation before they granted a Prohibition, and they coloured their Obligation with the Statute of 31 E. 3. cap. 11. That an Administrator shall be countable to the Ordinary. And Harvey said, that he knew where a man that was rich died, and the Ordinary had 600 l. to pious uses, before he would grant

grant adminiſtration. But he ſaid that in the time of Sir Iohn Bennet, ſuch an Obligation was queſtioned, and they would not endure the tryal of it. Hutton ſaid, that now for that that they could not diſtribute, they might invent a new way (ſcil.) divide the Adminiſtration. As if the Eſtate be 400 l. they might grant Adminiſtration of the Goods, of the value of 100 l. to the other. But by him and Harvey, That is illegally granted. Hil. 4 Car. Com. Banc.

Doctor Wood and Greenwoods Caſe

DOctor Wood libels againſt Greenwood in the Eccleſiaſtical Court for tithes of Wool, Wood, and Apples, &c. And he ſhews that he was Vicar there; and that the 8 E. 1. there was a compoſition that the Parſon ſhould have the tithes of Grain and Hay, & præterea the Vicar ſhould have Alteraginum; And for that that thoſe tithes did not belong to the Vicar, he prayed a prohibition. And Henden objected, that the Pariſhioner ought to ſet forth his tith, and not diſpute the Title of the Parſon or Vicar. But the Vicar ought to come in the Spiritual Court pro intereſſe ſuo; but notwithſtanding that, and notwithſtanding the Vicar refuſes to claim thoſe tithes, & that always within memory they have been paid to the Parſon, yet a prohibition was granted: And in the end (upon this Compoſition) power is reſerved to th Ordinary, if any doubt or obſcurity be in the compoſition, to expound or determine it; And if he pleaſe to encreaſe the part of the Vicar. And there was not power of diminution. As by Hutton, It is alſo uſual in ſuch compoſitions; And they ſay that the word Alteraginum ſhal be expounded according to the uſe. As if wood had always been paid to the Vicar by vertue of this word; ſo it ſhall continue, otherwiſe if not. And ſo it had been ruled in the Exchequer. And upon that preſident it was ruled accordingly in this Court. And by them, wood is minuta decima, as in the caſe of St. Albans it was ruled.

Sir Richard Dorrel againſt Blagrave.

SIr Richard Dorrell was Plaintiff in action of debt upon an Obligation of 400 l. againſt Blagrave, who demanded oyer of the condition, which was, that if Blagrave fulfilled and kept all Covenants and agreements in an Indenture, &c. between him and the Plaintiff, which on his part is to be performed and kept; Then the Defendant pleads that he had performed all the Covenants on his part to be performed, &c. And the Plaintiff ſhews that Blagrave the elder, by his Indenture granted a rent of 20 l. per annum, to one that he intended to marry for her joynture, which was to commence after his death; And that it was out of all his lands in Watchfield. And afterwards by the ſame Indenture, he Covenants that he was ſeiſed of a good and perfect eſtate in Fee ſimple of lands and tenements in Watchfield to the value of 40 l. per annum. And he aſſigns for breach that Blagrave was not ſeiſed of an Eſtate in Fee of the lands and tenements aforeſaid in Watchfield. Whereupon the Defendant demurred: And Heidley moved two queſtions; Firſt, that admitting the breach here well aſſigned, yet the obligation is not forfeited. And then when the Defendant is bound, that he perform all Covenants on his part to be performed, and not to the Covenants broken. As if Leſſee for years (rendring a rent at Michaelmas and the Annunciation) covenant to pay the rent at a day, and afterwards he fail; and then a Stranger is bound that he perform all Covenants, &c. That extends to the failer of payment, which is paſt here in our caſe. And by the whole Court not allowed: For by ſuch means all aſſurances of England ſhould be deluded. And now in this caſe the Indenture and the Obligation ſhall be ſealed and delivered at the ſame time. But if the Obligation had been

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Hil. 4 Car. Com. Banc.

ſealed afterwards at another day, yet it was allowed. For by Richardſon, Suppoſe that the Condition of the Obligation recites the grant, &c. And the condition is, that if the land charged be to the value of 40 l. per an. that will be a good condition, and the Obligation ſhall be forfeit. If the condition was, that the Land was then of ſuch a value, it was preſently a breach of the Condition. The ſecond matter was, whether the breach was well aſsigned or not And Richardſ. & Yelvert. held that the breach is not well aſsigned. There are two things in the Covenant, one of the Eſtate, another of the value. Here may be a breach to be aſsigned upon the Eſtate, but then it ought to be general: For the grant out of all his lands and tenements in Watchfield, is not a concluſion to him who has lands and tenements in Watchfield, then the Obligation is forfeited. As if one be obliged to make a Feoffment to I. S. of all his lands which he had by deſcent in D. If he had no lands there, it is not a forfeiture. So here. But if the rent was granted out of particular land, as out of the Manor of D. There the grantor is included to ſay, but that he was ſeiſed of the Manor of D. which was granted. As to this diverſity, the word prædictis had relation to lands and tenements in Watchfield, for no lands were named. But the material thing is the value, &c. And if prædict. goes to all the Lands, then the breach goes to more than the Covenant, and then it is not met with. But admit that it goes to all, yet it is all one: For the intention of the parties was, that the value of 40 l. jointure per annum ſhall be mentioned. But the Plaintiff does not mention the value. And it is ſure that the word prædict. may goe to all the lands in Watchfield, or to lands of 40 l. And if the Defendant had rejoyned, he might have rejoyned generally, ſcil. That he was ſeiſed of lands in Watchfield in Fee ſimple, and he is not forced to ſhew his particular eſtate in the lands. And admitting they had gone to tryal upon that iſſue, what might the Jurors find. And if they had found the value, it is nothing to the breach; That is more than was in their charge, and ſo void. But Hutton and Harvey on the contrary, and ſaid, that the breach is well aſsigned. And Hutton took this difference, That if the Covenant was that he was ſeiſed of ſuch particular lands of ſuch value; The breach ought to be aſsigned in particular alſo; but where it is, that he was ſeiſed of lands of ſuch a value, the breach is now well aſsign'd, where it is a recital of lands, of the value of 40 l. per an. & to that predict has relation. And it does not appear to us if he had more lands in Watchfield, than of 40 l. per an. But theſe things were agreed by all. Firſt that the antient pleading in the time of H. 6. is now changed, and the general pleading of all Covenants in the Indenture in form, although that the affirmative is good: And the Plaintiff ought to ſhew the particular Covenant broken, &c. Secondly, in the principal Caſe, if the Plaintiff had replyed, that he was not ſeiſed of lands and tenements in Watchfield in Fee-ſimple without prædict. or deque fuit ſeiſe de nullis terris vel tenementis prædictis in Watchfield of the value of 40 l. in modo & forma, & ſecundum formam conventionis, is a good aſsignment of the breach; And the Defendant forced to ſhew the particulars. The Plaintiff diſcontinued the principal ſute, and begins again; but that he might not doe without the licenſe of the Court, as they ſaid, Becauſe that they might agree afterwards to give Judgement.

Taylors Caſe.

TAylor was Plaintiff againſt Waterford in debt upon an Obligation, and the Defendant demanded Oyer of the Condition, quæ legitur ei in hæc verba. If the Defendant ſhould pay ſuch coſts as ſhould be aſſeſſ at the Aſsizes (without ſhewing for what) the Obligation ſhould be void,

And

And the Plaintiff replies, that poſt confectionem Obligationis, the afore- ſaid words were written upon the Obligation; and the truth is, that they were endorſed upon the Obligation, by memorandum, after the Delivery. And Atthowe moved that the Plaintiff might not reply in that manner, becauſe that when Oyer of the condition was demanded, that was entred for a condition, and ſo was admitted by the Plaintiff. And for that he is concluded to ſay the contrary. But Serjeant Davenport replyed on the contrary. And ſaid firſt, that the words of themſelves, will not make a condition. It is Littletons caſe, That ſome words doe not make a condition, without a concluſion, as what is contingent, 39 H. 6. And admit that the words will make a condition, yet they were written after delivery. 3 H. 8. Kellways reports. Hutton, If there be an Obligation made of 20 l. & if it be written upon the back of the Obligation, before the ſealing and delivery, The intent of this Bond is to pay 10 l. for ſuch coſts, That is no good condition. Which Juſtice Harvey only being preſent agreed. And if any thing may be part of the condition, it ought to be written before the ſealing and delivery, But it is no condition if it be written after. And by them, here is no concluſion but that the Plaintiff may plead, that the words were written after ſealing and delivery. *P. Jac. 4 Car. Com. Banc.*

Termino Paſch. Anno 5. Car. Regis Com. Banc.

Mericke againſt King.

IN evidence to the Jury, he who had purchaſed the land in queſtion (It was ſaid by the Court) he ſhall not be a witneſs if he claim under the ſame title. Richardſon ſaid, that the conveyance may be proved by other circumſtances. And the ſame reaſon was alſo agreed by the Court, That if a Feoffment be made of a Manor to uſes, that if the tenants have notice of the feoffment, that although they have not notice of the particular uſes, their attornment to the Feoffees is good; For the Feoffees have all the eſtate. And Harvey ſaid, that ſo it was agreed in one Andernes's caſe.

Sir Richard Moors Caſe.

IT was ſaid in evidence to the Jury. The caſe was, that a man preſcribes to have common in 100 acres, and ſhews that he put his cattel in 3 acres, without ſaying that thoſe three acres are parcel of the 100, yet good. And Hitcham ſaid, that ſo it was adjudged in this Court. And Richardſon ſaid, it was an Huntingtonſhire caſe, Where a man alleged a cuſtom to put his Horſes, &c. And the cuſtom was for Horſes and Cows. And adjudged good. Hutton ſaid, there can be no exception to the Witneſs, who is Cozen to the party, to hinder his evidence in our law, To which all agreed.

Clotworthy againſt Clotworthy

THe caſe between Tenkely and Clotworthy was cited. One grants an Annuity for him and his heirs, to be paid annually, at two uſual feaſts, for 30 years, which was to begin after the death of the grantor.

And

Hill. 4 Car. Com. Banc.

And it was agreed by all (Richardſon being abſent) that, that is a good Grant, and charges the Heir, although it firſt commenced upon him. Yelverton ſaid, he charges himſelf; And the Grant is for him and his heirs. And warranty, which is ſo granted to commence 40 years after, although the Father dye before the commencement of it, yet it binds the Heir. And ſo it is of an Obligation to be paid 40 years after. Quod conceſsum fuit.

Beckrows Caſe.

IN one Beckrows Caſe, in evidence to the Jury, &c. Beckrows intending to marry a Widdow makes a conveyance by Deed of Feoffment of his Land, to ſeveral uſes, by which he ſetled his Land upon the iſſue of the Feme, having iſſue by a former wife. But after the mariage, he by much importunity procured the Deed of conveyance into his hands, out of the cuſtody of the Wife, and alſo an Obligation which makes mention of it, and it was for perfomance of Covenants, and then he cancelled the Deed, and the Obligation, and took off the ſeal from them; And afterwards ſettles his Land upon his former Children, and dies (having Iſſue by his laſt wife.) And in actions under theſe conveyances; It was permitted by the Court that the cancelled Deed ſhould be read in evidence. But firſt there ſhould be Teſtimony given of the truth of that practice, before it ſhould be read, &c.

A Copiholders Caſe.

IT was ſaid by Richardſon to Harvey privately. That there is almoſt no Copyhold in England, but the Fine in truth is uncertain. For if the Rolls make it appear, that ſome time a leſſer, and ſometime a greater ſum had been paid for a Fine, that is an uncertain Fine. And he ſaid that he was of Councel in a Caſe, where the Jury found that the Fine was certain, And afterwards by Bill in Chancery, It was decreed upon ſearch of the Rolls, to be a Fine incertain. And that is now the ordinary courſe (ſcil.) by decree in Chancery.

Francis Bill againſt Sir Arthur Lake.

FRancis Bill was Plaintiff in an Aſſumpſit againſt Sir Arthur Lake, who aſſumed to the Plaintiff, that in conſideration that he would make for his wife certain apparel, and prepare ſtuff and lace for it; That he would pay for the ſtuff and making as much as ſhould be required. And he ſhews that he provided Sattin and Gold-lace, and made the Apparel, and ſhews of what value the Stuff was, and what he deſerved for his labour, which amounted to the value of 39 l. and that he required the Defendant ſuch a day to pay him, which was within ſix years before the action brought, but the promiſe was laid to be 7 years before. The Defendant pleads the Statute of Limitations, and that the Plaintiff did not bring his Action within the ſix years after the promiſe made, nor within the 3 years after the Parliament ended. But he does not ſhew when it ended. Upon which there was a Demurrer. And by the Court the ending of the Parliament néeds not to be ſhewn here; For the Queſtion is not upon the 3 years after the ending of the Parliament, but upon the matter in Law, whether an Action ought to be brought within ſix years after the promiſe, or after the requeſt. Richardſon ſaid, That it ought to be within ſix years after the promiſe. There are two cauſes of Action (for the words

words of the Statute are within ſix years after the cauſe of Action) the promiſe, and the requeſt, and the promiſe is the principal, and the Action took its denomination from that, (ſcil.) an action of the Caſe upon an Aſſumpſit. And if there be a dem and which is the caſe of Action: Here it will be anſwered, the promiſe for a Requeſt without promiſe is no cauſe of Action. And the miſchief that the Statute intended to remedy was, that a man was ſhould not be put to the proof of the matter de facto ſo long time after. And if the requeſt is ſaid to be the cauſe of Action, the promiſe may be laid 20 years before, and although that may be proved. But the other 3 Juſtices were againſt him, and ſaid, That the intention of the Statute is, within 6 years after the cauſe of the Sute given, which is not untill after requeſt. As if one promiſed to another ſo much when he ſhould marry his Daughter. The 6 years there ſhall be after the marriage; Or if one promiſe ſuch a ſum to one at his return from Rome, or ſuch a place, from whence it is not impoſsible to return within ſix years. The payment ſhall be after the return, and there is not a cauſe of Action before: and alſo the promiſe and the Requeſt are intire; For the requeſt is part of the promiſe, and the promiſe is not intire untill the requeſt. They agreed, if a man makes a requeſt, and ſuffer the 6th year to paſs before an action brought, and then makes a new requeſt. And this Caſe was more ſtrong, becauſe the conſideration was future. Heidley ſaid, there was a difference where the requeſt is neceſſary, and where it is alleged but for form. As if I ſell a Horſe for 10 l. generally, and after the 6 years brought an Action upon the Caſe upon an Aſſumpſit againſt the Vendee, and ſhews in his Declaration, that he was to be paid when he would require it, & licet ſæpius requiſit. &c. within the ſix years; Here the Plaintiff is barred; For it was due by the contract, and the requeſt is but formal. If a man brings an Action within the 6 years, and afterwards is non-ſuted for want of requeſt ſhewn where it was neceſsary, and makes a new requeſt after the 6 years, and brings his Action; It is good; Which was granted by the Court. And in this Caſe, the Court tayed Henden, for adviſing the Defendant to plead the Statute, and hazard it upon Demurrer. When he might have tryed firſt the matter in fact. But Henden ſaid, it was dangerous not to plead the Statute. For the opinion of the Kings Bench and Exchequer ſeemed to be, that it ought to be pleaded. By the Court, when it is apparent within the Record, that the Action is brought after the 6 years certainly, they doubted not but the Statute ought to be ſhewn in arreſt of Judgement. But the doubt is when a general iſſue is pleaded in an Aſſumpſit or Treſpaſs, and it does not appear in the Treſpaſs or Aſſumpſit, that it was above the ſix years, the Statute now may be given evidence.

Trin. 5 Car. Com. Banc.

Trin. 5 Car. Com. Banc.

Starkey againſt Taylor.

STarkey an Attorny of the Common Bench brought an Action againſt Taylor for ſlanderous words, and declares that he being an Attorney of the Common Bench, of honeſt fame, &c. and that he gained much by that profeſsion, which was his Livelihood, the Defendant maliciouſly and to hinder him in his profeſsion ſpoke theſe words of him, Thou art a Common Barrettor, thou art a Judas, and a Promoter, and a Deſtroyer, and a Viper, and a Villain, and afterwards at another time he ſpoke theſe words of him, That he was a Common Barrettor, and a Villain, and he would make him loſe his practice. And upon not guilty pleaded, it was

Tot. 5 Car. Com. Banc.

found that the Defendant ſpoke theſe words, Thou art a Common Barretor, and a Judas, and a Promoter. But not the other words; And 50 l. dammages was given to the Plaintiff. Upon which Ayliff moved in arreſt of Judgement, becauſe the words were too general. And if they had bin ſpoken of another perſon, they would not lye, Hil. 30 Jac. Hawk againſt Moulton, I will not leave thee any thing, thou art a common Barretor. And there was demurrer joyned upon the Declaration, but no Judgement. The words are here found without relation to his profeſsion. But if the laſt words had bin found it would have been queſtionable. Mich. 41 Eliz. Hather an Attorney brought an action for theſe words, Thou art a Flagging Jack, and a Couſener, and wouldſt have couſened me. And adjudged not actionable, Becauſe it does not appear, that they were ſpoken with relation to his profeſsion. But Hitcham, Barkley, and Heidley of the other ſide. And that the words were actionable, being ſpoken of an Attorney, (ſcil.) to ſay he is a Common Barretor. For although there is a doubt, if it be ſpoken of a Common perſon; Yet theſe are ſcandalous to an Attorney, for no man now will retain him in his Buſineſs. If one had ſaid of an Attorney, That he is a Common ſtirrer up of Suces, and a diſturber of the peace, and ſo a mover of unjuſt actions without doubt it had been actionable. And a common Barretor comprehend all that. Hil. 8. It was doubtfull whether a Thief were actionable without alleging when and what he had ſtoln. But it was adjudged actionable, For Thief intimates, that he had done all that which might make him a Thief. And ſo Bancrupt to a Merchant. A Common Barretor in 8 Coment. is ſaid to be a Common mover of ſtrifes, and there it is ſaid, that he ought to be fined and impriſoned, if he be convicted. Weſtminſter 2. cap. 32. There it is ordained, that a Sheriff ſhall not permit a Barretor to remain in the County, much leſs this Court will not permit him to be an Attorney. For it is, that an Attorney ought to be diſcreet and of honeſt behaviour 4 H. 4. cap. 18. 3 Jac. cap. 7. They ought to be men of ſufficiency, and honeſt diſpoſition. Theſe words touch him in his honeſty and diſpoſition. An Attorney ought to be a man of good conſcience. 20 E. 4. 9. There it is ſaid, that if a Client will put in a Plea which the Attorney thinks in his Conſcience is not true, he may plead non ſum informatus, and diſceit does not lye againſt him; then if the words ſhould be true he touches him in his profeſsion, and he might never more be an Attorney. In Birchleys Caſe, 4 Rep. You are a corrupt man; Theſe are ſmaller words, and more general, yet actionable. Yet ſuch words make a man to miſtruſt him, and truſt next to ſkil is moſt requiſite in an Attorney. 14 Jac. Com. Banc. Rot. 1753. Small an Attorney againſt Moon. He is a forgeing Knave, adjudged actionable, yet to a common perſon they ſhall not be accomptable, and the caſe before. Diſtrey an Attorney brought an action againſt Dorrel in the Common Bench for theſe words, Take heed of him, for he is the falſeſt Knave in England, and he will cut your Throat. And judged actionable, and that the words ſhall be underſtood, falſe as an Attorney. And a Common Barretor is more infamous than any of theſe. And the word Judas here ought to be accepted according to the uſual underſtanding of it (ſcil.) for a betrayer. And what can be more ſcandalous to an Attorney, than to be a Betrayer of his Clyente? For which he prayed Judgement for the Plaintiff. Richardſon ſaid, It is doubtfull, whether the words will bear an action; Barretor is a notorious offender, and if he be to be convicted he is to be fined and bound to his good behaviour. And it is hard to make a definition of a Common Barretor, but a deſcription may be made, that he is a mover of Sutes and contentious in diſpoſitions and practice. But whether the words ſhall have relation to him as Attorney is the Queſtion. Birchleys Caſe, A corrupt man. This directly relates to his practice, ſo

of

of Couſener. But ſuch a thing which ought not to be applyed to him as Attorney is not actionable. Common Brabler, Swaggerer, Breaker of the Peace, which Barretor comprehends, being ſpoken of an Attorney, are not actionable. For they do not refer to him as Attorney. And the Statute cited before of Weſtminſter 2. It is to be intended, if he be found to be a Barretor. And then he ſhould be put out of the Court. And here if there had been a communciation of him as an Attorney, then it would be actionable. But it ought to be laid habens Colloquium of him as Attorney; For then of neceſsity it ought to be underſtood of his Office. And ſo alſo the words, Truſt him not, he will cut your Throat, ought to be underſtood of him as Attorney, he will cut the throat of your Cauſe. Hutton and Harvey on the contrary. And ſaid the words here are as well applicable to his profeſsion, as if it had been found, that there was a Colloquium of him as Attorney. For it is laid that he was an Attorney, and that he lived by that profeſsion: and that the Defendant maliciouſly to hinder him in his profeſsion ſpoke theſe words. It hath been ſaid what a Common Barretor is, and his puniſhment is appointed by 24 E. 3. Littleton alſo mentions, ſpeaking of Feoffments made to Barretors, (ſcil.) Quarrellors, then being ſpoken of an Attorney: none but quarrelſome men will go to quarrelſome Attorneys. For although he deals in Suites, yet his carriage and practice ought to be fair and peaceable. And without Queſtion if it be ſaid, Thou art a couſening Attorney, an Action lies; But by Harvey, perhaps Couſening generally will not. And if of a common perſon it be ſaid, He is convicted of common barretry, It will bear an Action. And by Hutton, to ſay of an Attorney he is a Recuſant convicted, it will bear an Action. If it be ſaid of a Judge that he is a Common Barretor, an action lies. And if it be actionable for ſpeaking ſo of a Judge, it is ſo of an Attorney; For he is in an inferiour ranck a Miniſter of Juſtice, and he ought to be choſen of the moſt honeſt, diſcreet and religious men: and theſe words if true, make him incapable of being Attorney here. As in Smalls Caſe before, it was held, To ſay of a Biſhop, he is a Papiſt will bear an Action; For then he cannot hold his Biſhoprick. If one ſaid of a Merchant, he is a poor man, is not actionable. But if he ſaid he is worth nothing, had been queſtionable. Becauſe that it tantamounts to a Banckrupt. And by them the word Iudas is material here, for loquendum ut vulgus. If he had ſaid you have plaid the Iudas with your Clyent, without doubt is actionable. Which Richardſon alſo agreed, and ſaid if one ſays of an Attorney, that he is a falſe Attorney, an action lies. Sed adjournatur.

Trin. 5 Car. Com. Banc.

Hawes's Caſe.

IN Dower the Defendant pleads ne unque ſeiſe que dower. It was found by the Jury that the Husband was ſeiſed, and died ſeiſed, and aſſeſs dammages to the Plaintiff generally. And it was moved in arreſt of Judgment, becauſe that the Jurors did not enquire of the value of the land, and then ultra valorem terræ, tax dammages, as much as is the uſual courſe, as the Prothonatories informed the Court. For the Statute of Merton gives dammages to the Wife (ſcil.) valorem terræ. And the Statute of Glouc. cap. 1. gives coſts of ſuit. But by the Court Judgement was given for the Plaintiff; although the dammages are given generally, and certainly intended for the value of the Land. And there might be in the Caſe a Writ of Error.

Hil. 5 Car. Com. Banc.

Simcocks againſt Huſſey.

SImcocks brought waſte againſt Huſſey for cutting 120 Oakes, and the Jury upon nul. waſt. pleaded, found him guilty of cutting 20 in ſuch a field, and ſo ſparſim in other fields, which was returned upon the Poſtea; but nothing ſaid of the other 20. where in truth the Jury found him not guilty of them, but the Clark of Aſsizes took no notice of that. By the Court, If the Clark had taken notice, there might have been an amendment by them; But here they gave direction to attend the Judge of Aſsize to examine the truth of it. And if they could procure the Clarks to certifie the reſidue, they would beleeve it.

Dower.

DOwer was brought for the moiety of 45 acres of land, and for part non tenure was pleaded, which was found for the Plaintiff, and for other part Joyntenancy, which was after imparlance; Whereupon the Plaintiff demurred, and Bramſton prayed Judgement, and anſwered farther, for that that it was after imparlance, and cited one Docto; Waterhouſes caſe in Dower, where it was adjudged, that non-tenure after imparlance was not a plea; And by the ſame reaſon ſhall not joyntenancy be, 32 H. 6. 29. And by the Court it was adjudged quod reſpondeat ouſter. But otherwiſe it would have been, if there had been a ſpecial imparlance tam ad breve quam ad narrationem. And it was prayed to have Judgement upon the verdict. And by the Court it was ſaid, that they ſhould have Judgement. And that there might be two Judgements in this action for the ſeveral parts of the land.

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Cal: 308

Sir Francis Worthly againſt Sir Thomas Savill.

HE brought an action againſt Sir Thomas Savill for batterie; In which it was found for the Plaintiff in not guilty pleaded, and 3100 l. damages was given. Which verdict was laſt Term. And in this Term it was ſhewn to the Court, that the Declaration entred upon the imparlance roll, was without day, moneth, and year, in which the battery was committed. Which was obſerved by the Atturneys, and Counſel of the other part, and that a blank was left for it. But afterwards in the time of this vacation in the night time, the Key of the Treaſury being privily obtained by a falſe meſſage from Mr. Brownlow Prothonotary, the record was amended, and ſome things, were interlined to make it agree with the Iſſue Roll, which was perfect; And theſe things were affirmed by ſeverall affidavits. Whereupon Atthowe moved, that thoſe parties privie to this practice might be puniſht, and that the record might be brought in Court and made in ſtatu quo prius. Crew on the other ſide demanded Judgement for the Plaintiff, for whether there is an imparlance Roll or no. If none, then the matter is diſcontinued, and that aided by the Statute: If you will have an Imparlance Roll, then I think theſe omiſsions are amendable by the Clarkes although after verdict. Harvey, The Courſe of the Court is, (for I am not aſhamed to declare, that I was a Clark for 6 years in Brownlowes Office) If the Declaration was with a blank, and given to the Attourney of the other ſide, if in the next term, the Atturneys of both ſides agree upon the Iſſue Roll, Upon this agreement, the Clark for the Plaintiff had always power to amend the Declaration; Becauſe, that by the acceptance of the other ſide there was an aſſent. Richardſon, The imparlance Roll is the

original Roll, and ground for the Iſſue Roll, which is the Record of the Court: And I agrée that it is reaſon to amend the niſi prius Roll. Harvey gave an excellent reaſon, whereupon the Pregnotaries were demanded, what was the courſe of the Court. Brownlow, Gulſton, and Moyle all agréed that the courſe is; That if no recordatur or rule be to the contrary, and a Declaration delivered with blanks, the Clarks have alwaps amended it. And Brownlow ſhewed where the book of 4 E. 4. was objected to the contrary, and he had ſéen the Record, and there was a recordatur granted. Richardſon, Debt is brought againſt one as heir, and there is omitted ad quam quidem ſolutionem hæredes ſuos oblig. ſhall that be amended. And it was ſaid by all the Pregnotaries it ſhould. And Moyle ſaid that in 13 Iac. there was a caſe between Parker and Parker, upon a trover and converſion, and the Imparlance Roll was entred with a blank as here, and upon non-guilty pleaded, it was found for the Plaintiff, and I fear it will be mended. By the Court this difference will reconcile all the books, ſcil. where there is a recordatur, and where not. It was agreed by ſome one of the Judges, that a recordatur might be granted out of the Court. And ſo Brownlow cited a preſident, Paſ. 4 E. 4. rot. 94. to the ſame purpoſe. And ſo Judgement was given for the Plaintiff.

Hil. 5 Car. Com. Banc.

That an imparlance roll may be amended if no recordatur.

Starkeys Caſe before.

IUdge Yelverton now being in Court, the Counſel of the Plaintiff prayed his opinion, and ſhewed the reaſons given before to have Judgement. And Yelverton ſaid, that the word Iudas here, did not bear an action. It was two of the Apoſtles names; and the betrayer Iudas, was a Traytor to Heaven, and therefore this reaſon ſhould not be drawn to earth, to cauſe Actions between men. But for the word common Barretor, being ſpoken of a common perſon is not actionable, until conviction, he is not puniſhable for it. If he called him convicted Barretor, it is actionable: But being ſpoken of an Atturney, or an Officer of Juſtice, it is actionable. Littleton tells us what they are, they are meant ſtirrers up of unjuſt ſutes, which is a grand offence in an Atturney. And they put the caſe of Sir Miles Fleetwood. One called him the Kings Deceiver, which was adjudged actionable, and that it ought to be underſtood of his Office. And for that in the principal caſe Judgement was given for the Plaintiff.

Convicted Barretor to a common perſon is actionable.

Iohn Coſtrell againſt Sir George Moor.

IOhn Coſtrell and Ioan his wife brought an action upon the Caſe, againſt Sir George Moor, and declares, That whereas the ſaid Iohn and Ioan were ſeiſed of a Meſſuage and lands in right of his wife Ioan, and that the ſaid Iohn and Ioan, and all their predeceſſors, time out of mind, &c. had common in ſuch a waſte, which is the ſoyle of the Defendant, pro omnibus averiis levantibus & cubantibus, &c. and the Defendant had incloſed 20 acres of the ſaid waſte, and made a fiſh pond of it there, ſo that they could not take the profits, as before with their cattel: Upon the general iſſue pleaded it was found for the Plaintiff. And Crawley moved in arreſt of Judgement; For that the preſcription is ill made, and that the Husband and wife cannot joyn in this action, but the Husband might bring the action only. And alſo where it is ſaid, that they cannot take the profits with their Cattel, when the wife cannot have Cattel during the Coverture. Richardſon ſaid the preſcription is good, and it would have been better if he ſaid all thoſe whoſe eſtate the wife had; But this tantamounts, and is as well in ſubſtance, for that goes meerly to the eſtate

A man having land in right of his wife in truſt. they cannot both joyn in the action, but the Husband only.

Trin. 5 Car. Com. Banc.

eſtate of the Wife, which was granted. But for the ſecond, I doubt if the Wife may joyn in this Action. If a man be ſeiſed in right of his Wife, he may have Treſpaſs, for Treſpaſs done upon the Land, there the Wife ſhall not joyn, for ſhe cannot have the dammages if ſhe ſurvive. And there is no difference between this Caſe, and the principal Caſe; It is Trepaſs on the Caſe, and for the perſonal and temporary treſpaſs, and ſuch for which the Wife ſhould have the Action after the death of the Husband, unleſs that the Defendant continue the Pond, &c. I agree if Battery be done to the Wife, they both ſhall joyn, for the Wife might have had the Action if ſhe ſurvived. And ſo it was reſolved in the Cooks of Grays-Inns Caſe they might joyn. For the wrong was done to the Wife. But here the Husband only loſt the benefit of the Common, and the wife could not take it with her Cattel; For ſhe had not any Cattel during the coverture. And Yelverton alſo was of the ſame opinion. But Hutton ſaid, In a Quare impedit the Husband and Wife ſhall joyn; And yet the avoidance goes to the Executors of the Husband. Hitcham, In an Ejectione firm. or ravithment of Ward the Feme joyns, quod conceſſum fuit. Yelverton ſaid, that in 4 E. 4. it is expreſs that the Wife ſhall not joyn in treſpaſs done upon the Land of the Wife, for dammages ſhall be recovered in lieu of profits.

Moor againſt Everay.

MOor and his Wife brought dower againſt Everay. To parcel he pleads non tenure, and to the other parcel ne unque ſeiſe de dower, which goes to the tryal, and there the Tenant makes default, and upon that a petit cape is awarded, and now at a day in bank, one Lumbard prays to be received upon the Statute of Glouceſter to ſave his term, &c. But Henden alleged to the contrary. Firſt, That Statute is not to this purpoſe in force by the Common law. Tenant for years cannot falſifie 6 Rep. Periams Caſe. Then becauſe it was hard that a recovery ſhould be had by Covin, and the Leſſee for years without remedy for his term, the Statute of Glouceſter was made, which gives a receipt for the Leſſee for years, after the Statute. 21 H. 8. was made, which gives the Leſſee power to falſifie. The Common experience of the Court is, If an habens facias ſeiſinam iſſue, there is not any ſaving of the term of Leſſee for years. Hil. 39 Eliz. in Beſts Caſe, A receipt was moved and denied. For if the Leſſee had a good term, he might have treſpaſs for entry upon him. Littleton though ſays in his Chapter of Tenant for years, that he ſhall be received. Hutton, The Statute of Glouceſter aids them only, who knew and had notice of the Recovery, 21 H. 8. aids them who had not notice of it. And it is better to prevent miſchief than to remedy it after, and as to that a final Bar. I was of Counſel in ſome Caſes, where the Leſſee was received. And if the Leaſe be not good, the Leſſor may avoid it by Plea (ſcil.) Traverſe or Demurer; And I remember the iſſue taken upon the Term, and found againſt the Termor. And it was Mr. Fulhams Caſe againſt Sergeant Harris. Sed adjournatur.

Fawkenbridges Caſe.

IT was moved (he having Judgement before) to have coſts, where the Court doubted, becauſe that it was a ſpecial Verdict: and the Statute of 23 H. 8. cap. 15. ſays, That where a Verdict is found againſt the Plaintiff. But in a ſpecial verdict, it is neither found for or againſt. But it may be ſaid, that when it is adjudged againſt the Plaintiff, then it is found againſt him. And 4 Iac. cap. 3. which gives coſts in an Ejectione firmæ, had the ſame words if any verdict, &c. But it may be anſwered,

That

That as in Demurrer no coſts ſhall be recovered, no more in a ſpecial verdict, For that the Plaintiff had a Prohibition cauſam litigandi. And the Statute may be intended of veratious Suites, &c. But Brownlowe ſaid, that he had many times given coſts upon the Statute of 4 Iacob. For that the Prothonotaries were commanded to ſearch Preſidents. *Trin. 5 Car. Com. Banc.*

The Univerſity of Cambridge.

THe Univerſity of Cambridge claimed by their Charter to be Clarks of a Market, and that they had power by their Office to make orders, and execute them. And they made an Order that no Chandler ſhould ſell Candles for more than 4 d. ob. the pound. And becauſe that one R. ſold for 5 d. he was impriſoned, and a Prohibition granted. But it ſeemed that an Habeas corpus was more proper, For he was not preſented.

First, For that they could not impriſon without courſe of Law.

Secondly, Becauſe that as Clarks of a Market, they have nothing to do with but Victuals, and Candles are not Victuals.

The Sheriff of Surrey againſt Alderton.

THe Sheriff of Surrey returns a reſcous againſt one Alderton. That whereas there was a Iudgement had againſt B. and a fieri facias awarded upon that, by vertue of this Warrant directed to R. to take the Goods of B. By vertue whereof ſuch a day the ſaid R. diverſa bona & catalla ipſius did levy, and had them in his cuſtody, and one Alderton reſcued them from the Bayliff, contra voluntat. ipſius Rich. The return is naught. No reſcous can be of Goods.

First, For that, that it is reſcued from the Bayliff.

Secondly, It is of Goods whereof a reſcous cannot be returned. Yelverton, contrary in both, If a man hinder the Sheriff to make execution, and aſſault him, will not a Reſcous lye in ſuch a Caſe? Richardſon, Hutton, and Henden, that it will not, That no Reſcous can be upon a Fieri facias, but the party ſhall have an Action upon the Caſe. And Reſcous lies only upon a Capias, which lies againſt the Perſon himſelf.

Iohnſons Caſe.

IF a Prohibition be granted upon matter at Common law, as upon a perſonal agreement between Parſon and Pariſhioner for his Tithes, and not upon matter within the Statute of 2 E. 6. 13. the ſuggeſtion ſhall not be proved within the 6 months as the Statute limites, and as it is agreed by the whole Court.

Termino Mich. 5 Car. Com. Banc.

Common Recovery.

A Common Recovery was ſuffered, and a writ of Entry was not filed: and for that a writ of Error was brought. And Hitcham moved that it might be examined whether any writ was filed or no. But the Court denyed that; But if it might appear upon Record, That

Mich. 5 Car. Com. Banc.

That there was a writ filed, then they would conſider, whether a new one ſhould be filed or or not. And they ſaid that the Recovery ſhould be exemplified, by the Statute of 23.

Knight againſt Symonds.

THe Plaintiff being caſt put this exception in to avoid coſts, that the Venue was miſ-written, and it was allowed by the Court. And becauſe the Defendant might have Judgement, for that he cannot have coſts. And Richardſon ſaid, that in the Kings Bench, one Grimſton brought an Action upon the Caſe againſt one Hoſtler, and it was found againſt him, and the Plaintiff alleged that the Declaration was not ſufficient, for the prevention of coſts, and allowed. But if the Plaintiff be non-ſuite, he ſhall not have benefit of the Exception to prevent coſts, by reaſon of the unjuſt vexation.

Harris againſt Lea.

HArris Warden of the Fleet is Plaintiff againſt Iohn Lea in Debt upon an Obligation, where the Condition was, That one Lea ſhould be his true Priſoner, and pay every month for his diet, and the fees due to the Plaintiff by reaſon of his Office. The Defendant pleads the Statute of 23 H. 8. and that this Obligation was made for the eaſe and favour of the priſoner by colour of his office. And the Plaintiff repiped, that the Fleet is an antient Priſon, and that time out of mind, &c. they uſed to take ſuch Obligations, abſque hoc, that this Obligation was made for the eaſe and favour contrary to the Statute, upon which the Defendant demurred generally. But Attbowe prayed Judgement, for that that the traverſe waives the matter before, which was but an inducement, and in 23 H. 6. There is an Exception of the Warden of the Fleet, and the Warden of the Palace of Weſtminſter, That they might take ſuch Obligations which they uſed; to which the Court agreed. And for that that the Traverſe ever deſtroys the Bar, the Defendant ought to have joyned in that, upon which Judement was given for the Plaintiff. Il, &c.

That the Warden of the Fleet and Weſtm. never may take Obligations for Dyet, &c.

Wardens Caſe.

IT was ſaid by the Court, Although an Eject. firm. lies of a Mannor or of the moyety of a Mannor, if Attournment of the Tenants may be proved, yet it is not ſafe to bring an Ejectione firmæ of a Mannor, &c.

Ejectments not lie of a Mannor.

Hides Caſe.

IN one Hides Caſe the Defendant was out-lawed before Judgement, and procures a Charter of pardon, and the Queſtion was, whether he ſhould put in bayl. And it was agreed by the Court, that he ſhould put in bayl. For although the Statute of 5 E. 3. cap. 12. goes only to a Charter of pardon, not to the reverſal; yet by the Equity of that Statute he muſt put in bayl: for it is that he ſtand right in Court, which is, that he appear and put in bayl. And although the uſe of the Court hath been otherwiſe, yet perhaps in ſome Caſes the Plaintiff never required bayl. New Entries, title Pardon, pl. 1. So if an Out-lawry be reverſed by 31 Eliz. for want of Proclamation; The Defendant puts in bayl at the Common Law. Manucaptors were only fined for the Defendants default. But now the uſe is for the bayl to enter into a Recogniſance, &c. And if at

at Common law upon a ſcire fac. he revive the ſute, he ſhall find Manucaptors, by the ſame reaſon he now found bayl. *Mich. 5 Car. Com. Banc.*

Wood and Carverner againſt Symons.

The Defendant here in the Prohibition libels for tithes of Hay in the Spiritual Court. The Plaintiff ſuggeſts that the Hay was growing upon Greenskips, Deales, and Headlands, and that within the ſame Pariſh there is a Cuſtom, that Pariſhioners in a meadow there uſed to make the tithe Hay for the Parſon, and in Conſideration of that to be diſcharged of all tithes of Hay growing ut ſupra, and alſo that for the Hay of the land, no tithe ought to be paid of ſuch Hay; but does not aver that the Hay was growing upon Greenskips, &c. And an exception was taken by Henden: Firſt, That the exception is double; The Cuſtom and Common law: But by Yelverton, that is not material: For you may have 20 ſuggeſtions to maintain the ſuggeſtion of the Court. But Richardſon was againſt that, that a ſuggeſtion might be double here, for the ſuggeſtion of the Common law is a ſurpluſage. As in Farmer and Norwiches Caſe here lately. One preſcribes to be diſcharged of tithes, where the law diſcharged him, and ſo was diſcharged by the Common law. Second exception is, that he does not apply the Cuſtom to himſelf in the ſuggeſtion. For he does not ſhew that the Hay grew upon the skips, upon which a Plow might turn it ſelf; That had laid the Cuſtom. And for this cauſe by the whole Court, the ſuggeſtion is naught. And here Richardſon moved, how that two ſhould joyn in a Prohibition. Yelverton, if they are joined in the libel, they may joyn in the prohibition, and that is the common practice of the Kings Bench. Richardſon, the wrong to one by the ſute in the Spiritual Court, cannot be a wrong to the other. Hutton, they may joyn in the writ, but they ought to ſever in the Declaration, to which Harvey agreed. Yelverton, the Prohibition is the ſute of the King, and he joyn tant. as in a writ. Richardſon, But it is as the ſute of the party is, and if any joyn here, I think good cauſe of conſultation. Richardſon. It is againſt the profit of the Court to ſuffer many to joyn. And it is uſual in the caſe of Cuſtoms of a Pariſh in debate, to order proceedings in the 2 Prohibitions, and that to bind all the Pariſh and Parſon. And it was ſaid by them all, That the conſideration of making Hay is a good diſcharge, becauſe it is more than they are bound to do. *Intrat. Hil. 3 Car. & Paſ. 4. Car. rot. 454.*

Riſes Caſe.

In evidence to the Jury, it was agreed clearly, that a Covenant to ſtand ſeiſed of as much as ſhould be worth 20 l. per annum, is meerly void. And ſo by the Court it was lately adjudged.

Flower againſt Vaughan.

Flower ſued Vaughan for tithes of hay, which grew upon Land that was heath ground, and for tithes of Pidgeons. And by Richardſon, If it was mere waſte ground, and yeeld nothing, it is excuſed by the Statute of payment of tithes for 7 years: But if ſheep were kept upon it, or if it yeeld any profit, which yeeld tithes, then tithe ought to be payed. As the caſe is Dyer. And for the Pidgeons which were conſumed in the houſe of the Owner; he ſaid that for Fiſh in a Pond, Conies, Deer, it is clear that no tithes of them ought to be paid of right; wherefore then of Pidgeons quod nemo dedixit, and a day was given to ſhew wherefore a Prohibition ſhould not be granted. And the Court agreed, that it was Felony to take Pidgeons out of a Dovecoat. And afterwards a Prohibition was granted, but principally that the Pidgeons were ſpent by the Owner. But by Henden they ſhall be tithable if they were ſold. * Felony to take Pidgeons out of a Dovecoat.

Mich. 5 Car. Com. Banc.

Clotworthy againſt Clotworthy.

IN Debt upon Obligation againſt the Defendant as Heir to Clotworthy (ſcil.) ſon of Clotworthy, without ſhewing his Chriſtian name. And Judgement was given againſt the Defendant upon default, and upon that Error brought, and that aſsigned for error, and after in nullo eſt erratum pleaded; But Henden moved that it might be amended, and he cited one Wolters and Weſtlys Caſe, Hil. 19. Iac. rot. 673. where in a Declaration in Debt upon an Obligation, there was omitted obligo me & heredes, and after was amended. And he ſaid, that in this Caſe, the Plea roll was without Commiſsion of the Chriſtian name, then by the Court the Plea roll may be amended by the Imparlance roll: but not è converſo. And the Caſe of the Obligation is the miſpriſion of the Clark; But here there was want of inſtructions.

Dennes Caſe.

IN Dennes Caſe of the Inner Temple, iſſue was joyned in a Prohibition whether the Will was revoked or not, and for a year the Plaintiff does not proſecute, nor continue it upon the Jury roll; And by the Court, now it is in our diſcretion to permit it to be continued or not: which the Prothonotaries agréed.

Moſſes Caſe.

IN one Moſſes Caſe in an Aſſumpſit for debt which was out of the 6 years limited by the Statute of 21 Iac. part within the time. If the Jury found for the Plaintiff, and tared dammages ſeverally; The Plaintiff recovered for that that is within the time, and not for that that was without. But if dammages are intirely tart, the Plaintiff cannot have Judgement of ſome part. Which was granted by the Court. And by Richardſon, where an Action is brought upon an Aſſumpſit in Law, and the Requeſt is put in, which is not more than the Law had done, the Requeſt there is not material; But where a Requeſt is collateral, as in Pecks caſe; there it is material. Hutton ſaid, that in Pecks Caſe it was agréed by the whole Court, that a Requeſt was material, but they conceived that the poſtea requiſitus was ſufficient; For which afterwards it was reverſed in the Kings Bench. Richardſon ſaid, if one ſells an Horſe for money to be paid upon Requeſt, and no Requeſt is ſhewn, he can never have Judgment, which was not denied.

Boydens Caſe.

BOyden Executer of Boyden brought a ſcire facias to execute Judgment given againſt Butler for the Teſtator, which was directed to the Sheriff, & upon nihil habet returned, & teſtatum, a ſcire fac. is directed to the Sheriff of S. who returns Ployden terretenant of the Manor which Butler was ſeiſed of at the time of the Judgement. Ployden appears and demands Oyer of the ſcire fac. and of the return, and pleads that long time before A. B. and C. were ſeiſed of the Manor in fee, and before the firſt return makes a feoffment to the uſe of one Francis Boyden for life, who makes a Leaſe to the Defendant for 80 years. And becauſe that Francis Boyden aforeſaid is not returned terretenant, demanded Judgement of the writs aforeſaid. Bramſton ſaid, that the concluſion here to the writ is naught: for a writ ſhall never be abated, where we cannot have a better. The matter here is the return of the Sheriff, that Mr. Ployden is terretenant, to which he makes no anſwer, but by Argument; And in all Caſes where a

ſpecial

ſpecial non tenure is pleaded it is uſed to be a Traverſe, upon which iſſue may be taken. 8 E. 4. 19. 7 H. 6. 16, 17. But in our caſe no iſſue was taken, and here all the matter alleged may be found, &c. For the matter, although general non tenure is no plea, yet a ſpecial non tenure may be pleaded, 7 H. 6. 17. 25. 8 H. 6. 32. In real actions non tenure of a Franktenement is good. But here a Chattel is only in queſtion. 2ly. he may plead non tenure of Franktenement, where the Leſſee ſhall be concluded, and bound; But here here Edw. Boyden is not bound. Crawly ſaid, that the plea is good, and for the matter, the difference is between the general and the ſpecial non tenure. The general non tenure is no plea, but in a præcipe quod reddat as it is; But a ſpecial non tenure is a good plea in a ſcire facias nomina præcipe. 31 H. 6. non tenure, 21 Statham ſcire fac. The Plaintiff in a ſcire fac. does not demand Land but execution. Yelverton, In Holland and Lees Caſe, in the Kings Bench this point. It was adjudged that the Writ ſhall abate. Richardſon, This Writ is a judicial Writ, and by that Plea a better Writ given you. For where before it was againſt the Terre-tenants generally, he might have now a particular ſcire fac. againſt Francis Boyden: and both waies are good, either to demand Judgement of the Writ, or Judgement of the Court, if execution ought to be againſt him; quod conceſſum per totam curiam. And agreed alſo by the Prothonotaries, that a ſpecial ſcire facias might iſſue againſt Francis Boyden. *Mich. 5 Car. Com. Banc.*

Turner againſt Disbury.

TUrner againſt Disbury in Treſpaſs; Where the Writ was quare domum & clauſum fregit, but the Declaration was, quare domum, & clauſum, & canem moloſſum cepit, which was found for the Defendant. And it was moved by Hitcham for the Plaintiff in arreſt of Judgement to prevent coſts for it; That there is not a material difference between the Original and the Declaration. For that that there is more in the Declaration than in the Original; And then here is no Original to warrant part of the Declaration. But this variance was between the Original it ſelf which remained with the cuſtos brevium, and the Declaration; For the Original as it was recited in the Declaration, according to the uſage in this Court, agreed with the Declaration. But by the Court, it is after verdict. For the Original for part cannot be applyed to this Declaration, and it ſhall not be taken as the Original for it; And then there is no Original, which is aided by the Statute, and ſo it had been frequently ruled. By Harvey it was one Blackwells Caſe here, where the Writ was bona & catalla cepit, and the Declaration was (viz.) unicum diſcum plumbi. And that was ruled to be no Original.

The Wife of Cloborn againſt her Husband.

THe Wife complains againſt her Husband in the Spiritual Court Cauſa ſævitiæ, For that he gave her a box on the ear, and ſpat in her face, and whirled her about and called her damned whore. Which was not by Libel, but by verbal accuſation, after reduced to writing. The Husband denies it, & the Court ordered the Husband to give to his Wife 4l. every week, pro expenſis litis and Alimony. Barkley and Henden moved for a Prohibition. The Sute is originally Cauſa ſævitiæ, and as a Caſe that they aſſeſſe Alimony. And now for a ground of a Prohibition. It was ſaid, that Cloborn chaſtiſed his wife for a reaſonable Cauſe, by the Law of the Land as he might, which they denyed, and ſaid, that they had Juriſdiction in theſe matters de ſævitia, &c. And afterwards that the wife departed, and that they were reconciled again. And

Mich. 5 Car. Com. Banc.

then that reconciliation took away that ſævitia before as reconciliation after elopement. Richardſon, It was ſaid here, that the Sute was now held and without Libel, but that is no ground of a Prohibition, for he proceeded upon that matter reduced in Articles, and we cannot grant a Prohibition if they proceed to their form. For we are not Judges of their form. But if they will deny a Copy of the libell, a Prohibition lies by the Statute. And you you'l ſay, that an Husband may give reaſonable chaſtiſement to his Wife, and we have nothing to do with it: But only that the Husband may be bound to his good behaviour by the Common law. And the ſentence in cauſa ſævitiæ is a menſa & thoro, and we cannot examine what is Cruelty and what not. And certainly the matter alleged is Cruelty; For ſpitting in the face is puniſhable by the Star-chamber. But if Mr. Cloborn had pleaded a Juſtification, and ſet forth a Provocation to him by the wife, to give her reaſonable caſtigation; Then there would be ſome colour of a Prohibition. Henden, We have made ſuch an Obligation, as it is abſolutely refuſed. Hutton, Perhaps he is in contempt, and then they will not admit any Plea. As if one be out-lawed at Common law, he cannot bring an Action. But the Plaintiff they adviſed to tender a Juſtification, and if they refuſed it, then to move for a Prohibition.

Bachus and Hiltons Caſe.

HUtton cited one Bachus and Hiltons Caſe in the Kings Bench, Where a Will was of Lands 17 Maii, and the Declaration 20 Maii, which was after, and ſo the Original before the treſpaſs, and after verdict. Becauſe it was miſtaken, Judgement was ſtayed.

Mortimores Caſe.

AMhurſt deſired the opinion of the Court in this Caſe. Copiholder is ouſted, and ſo the Lord diſſeiſed, and the Copiholder releaſes all his right to the Diſſeiſor, and dies, his Heir enters, and brings treſpaſs againſt the Diſſeiſor, who pleads his Franktenement. And by the Court the Releaſe is clearly void, the Diſſeiſor never being admitted Copiholder. But they ought not to teach him how to plead. And Hitcham cited a Caſe in which he was of Councel; Two Copiholders in fee, the one releaſe to the other by Deed. And that was adjudged a good Releaſe, which was now alſo agreed by the Court.

Earl of Mulgrave Ratcliffes Caſe.

Intratur Exchequer Chamber, 18 Iac. Rot. Argued by Sergeant Atthowe.

D'e Mercurii poſt feſtum Sanctæ Margaret. 17 Edwardi 2d. Iohn de Malo lacu gave to Peter de Malo lacu, and the Heirs of his body, the Caſtle and Mannor of Mulgrave, by divers mean conveiances the Land came to Sr. Ralph Bigod 11 Ian. 6 H. 8. Sr. Ralph Bigot made a Feoffment to William Huer and others to the uſe of his laſt Will, and died, and the right of the Land, together with the Entayl and the uſe, alſo after the Will performed, deſcended to Sr. Francis Bigot.

10 Dec. 28 H. 8. Sir Francis Bigod made a Feoffment to Iohn and others to the uſe of himſelf and Katherine his wife, and the Heirs of their bodies, and they had iſſue Ralph Bigod and Dorothy, then the Statute 16 H. 8. cap.

cap. 13. for forfeiture, for treaſon is made, and 26 Maii, 29 H. 8. Sir Francis Bigod was attainted of Treaſon committed 7 Ian. 28 H. 8. and was executed, and Katherine ſurvived. H. 8. by the ſpecial act of attainder of Sir Francis Bigod, and his forfeiture is made, 4 Novem. E. 6. Ralph Bigod Son of Katherine and Sir Francis was reſtored in blood, and died without iſſue. Dorothy maried Roger Ratcliff, and they had Iſſue Francis Ratcliff. *Mich. 5 Car. Com. Banc.*

5 Octob. 8 Eliz. Katherine died, and Francis Ratcliff died, having iſſue Roger Ratcliff 1 Febr. 34 Eliz. Francis Ratcliff, Roger Ratcliff entred 11 Aug. 33 Eliz. Office found for the Queen.

28 April. 34 Eliz. The Queen by Letters Patents granted the ſame to Edward Lord Sheffield and the Heirs males of his body begotten, at the rate of 9. 18. 3 d. Roger Ratcliff upon the whole matter ſued his Monſtrare de droit in the Exchequer, and had Judgement for him, and Writ of Error being brought by the Lord Sheffield to reverſe the Judgement formerly given in the Caſe.

Points 2. Firſt whether Francis Bigod who had Eſtate in ſpecial tayl in poſſeſſion, had alſo any right in the antient entayl left in him at the time of his Attainder, or whether it were not in abetance in reſpect of the Feoffment made 21 H. 8. and whether that right did accrew unto the King by the Attainder of Francis, and the general Statute of 26 H. 8. cap. 13. or by the particular act of Attainder of 31 H. 8. and I am of opinion, that there was a right of the old entayl remaining in him, and that the King ought to have it, together with that eſtate in ſpecial entayl in poſſeſſion freed and diſcharged thereof as long as the Eſtate entayl endured.

In the handling of this point, I ſhall occaſionally ſpeak of rights of Actions real, given or not given to the King upon Attainder of Treaſon, by force of Statute 26 of H. 8. or of the general Statute of 33 H. 8. for this Statute is ſo near of kin to that conſervation of antient Rights, that we muſt forſee that we do not in the Judgement of this Cauſe prejudice the Statute ex aliqua.

Secondly, Whether there be a Remitter in the Caſe after Attainder of Treaſon, and if there be ſuch a Remitter here, when the Remitter begins and in whom, whereas nothing hath as yet been diſtinctly ſaid. I am of opinion, that there ought to be no remitter in this Caſe to the old Entayl, and thereby I adde more, that if there be a remitter, it is but for a time, By the Office following it is remitted and ended, I muſt profeſs that whatſoever I have thought upon this Caſe, and adviſed upon it with my ſelf, I have met with two ſtrong affections, Zeal and Indignation; Zeal in the behalf of the King to preſerve the antient Rights of the Crown, and againſt the invaſion of Rebells and Traytors. Bigod that ſometimes brought a puiſſant Army into the field to depoſe the King, failing in that enterprize, now to riſe in Queſtion againſt him, that what he could not gain by the ſword, he might ſupplant by the Law; for though Ratcliff bear the name of this Caſe, yet I ſee nothing but the hand of Francis Bigod his Eſtate, his Right, his Title, Land per deſcent that maintains it. therefore let it not ſeem ſtrange that I am warm in this Caſe, for Zeal and Indignation are fervent paſſions, and I do profeſs to give Prerogative to the rights of the Crown in my care and vigilancy, and it is nobile Officium judicis & debitum due by Oath of Office to watch for him who works for us, ne quid detrimenti capit reſpublica, and if Charity begins at it ſelf, ſo ought Juſtice to do, that the King who grants Juſtice to all ſhould not be wanting to himſelf. Becauſe I deſire to be plain and clear in my Arguments, I will make the Queſtions as ſingle as is poſſible, for multiplex judicii nunc parit confuſionem, et quæſtiones quo ſimpliciores eo laudiores, ergo will I make this firſt point a ſingle

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Mich. 5 Car. Com. Banc.

Queſtion. Tenant in tayl of Land in poſſeſſion makes a Feoffment in fee, Queſtion, whether any right of the Entayl remaineth in him ſtill againſt his own Feoffment, and to what ends and uſes, and what he may do or ſuffer by force of this right in this Queſtion. I take no exception at the validity of the Feoffment made by Francis Bigod at ceſtui que uſe in tayl by the Statute of R. 3. and not the then Tenant in tayl in poſſeſſion, yet notwithſtanding taking the Caſe at the worſt, I am of opinion, that this Feoffment gives away all the Eſtate of the Tenant in tayl; and as concerning the Iſſue in tayl inheritable to that Entayl, and to him in the reverſion, there remains ſtill in the Iſſue a right to that Entayl by force of the Statute de bonis condi. and it is confeſſed on both ſides, that there remains a right of that Entayl by force of the Statute, for their uſe, and good, and whether it be for the Leſſor himſelf ſleeping till there be an Heir to claim it, or in the preſervation of the Law which is termed an abeyance, or in nubibus is the Queſtion, by which it appears that the exact enumerations of Rights, as jus habendi, redimendi, percipiendi, poſſidendi, recuperandi, & finendi, inferreth that there was no right, becauſe it was none of theſe rights, makes but a noyſe, for there is jus recuperandi when the time commeth, but it is in the mean time till the perſon inheritable appear, which may put this right in execution, which the Leſſor cannot do againſt his own Feoffment, it is the only Queſtion, and upon this exact diviſion of Rights, they have left out one whole member of Rights, ſuch are the Rights to depart with an Eſtate, and not to get or keep are omitted; ſuch are the Rights to give or releaſe or jus extinguendi, or jus renunciandi, to renounce or diſclaim, of which kind this very right is, That Tenant in tayl hath after the Feoffment, which had not diſcontinued finally to Bar the whole Entayl; for by that Right which is left after the Feoffment, the Eſtate tayl may be recontinued again, for the root of the Entayl is left alive ſtill. Now ſee the reaſon of this, and let the Statute of Weſt. of Eſtates tayl, and the pleading and practice upon that Statutes, which are the expoſitions of Law judge, the Statute recites the form of Fee-ſimple conditional which now are intayls, and then theweth 2 miſchiefs, that the Donees after iſſue had power to alien and diſinherit their Iſſues, and that the Donors were defeated of their reverſions, both being againſt the minds of the Givers, and the remedy provided in theſe words, It is ordained that the Will of the Giver according to the force of his Gift expreſſed in his Deed, ſhall be from henceforth obſerved, ſo that they to whom the Land was given under ſuch Conditions, ſhall have no power to alien, but that it ſhall remain to their Iſſue after death, and ſhall revert to the Donor after death, and if a Fine be levyed of ſuch Lands finis ipſi jure ſit nullus, but if neither Fine or Feoffment be void, for they are but voidable, not as before when they bound both Heirs and Donors abſolutely, ſo that it appears, whereas before the Statute the Donee had power abſolute poſt prolem ſuſcitatam; and ſo totally and in a ſort rightfully to diſinherite their Heirs, the Act being not againſt the rules of poſitive Law, to bar to all purpoſes aſwell his Iſſue as the Giver, as alſo himſelf.

Now ſince the Statute that very power of Alienation remaining againſt himſelf, not reſtrained by the Statute, though he may ſtill diſturb and diſcontinue it againſt them by expoſition, which the Statute hath received, which as Littleton ſaith Diſcountenance cap. 171. is a wrong to the Iſſue and the Giver, So that upon this Statute I reaſon thus, that the Tenant in tayl hath the whole Eſtate in tayl, and all the right of it in himſelf, and may finally and totally bar it as well againſt his Iſſue, as againſt himſelf by Common recovery, but by Feoffment or Fine he could not, by reaſon of this Statute. And that ergo ſummum jus, or verum jus intayl, though it be diſcountenanced, is not barred by the Feoffment,

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for it is not in his power by that kind of conveiance, and a non posse ad non esse valet argumentum necessario negative, so that the Argument stands thus, What the Tenant in tayl had and hath not parted withall remaineth in him still; but the main right in tayl he had, and hath not parted, ergo it remaineth in him still; for qui non habet potestatem alienandi, habet necessitatem retinendi. If you say that he hath parted with it, I deny it, for the Statute hath taken from him that power by Fine or Feoffment only, finis ipse jure sit nullus, which before he could have done; and the practice of the Law is answerable to this, both towards the Donor and towards the Issue; The Donor hath two things whereby he may be benefitted and prejudiced, the one in his Rent reserved, the other in his reverter, but the Issue prejudiced only in his Descender. Now for the Donor, when the Donee hath made a Feoffment and hath excluded himself from all rights as concerning himself, yet the Donor shall by force of this Statute, which at the Common law he could not. And if the Donor will release all his right in the Land to the Donee after a discontinuance by Feoffment, his release though it will extinguish no right to the very Land, yet it will extinguish Rents, which proves that the Donee by his Feoffment cannot dismiss himself of all his right, but that by the Statute of West. his alienation is disabled as to that, but that the Donor may avow for the Rent. But wheresoever Tenant in tayl suffers a Recovery, or levies a Fine, the Rents together with the entayl ceases. And the answer as to that is imperfect to resemble it to the Case of tenant in fee simple doth alien, and yet the Lord may avow upon him, for the Cases have no resemblance, for as Littleton well distinguisheth, when Tenant in fee hath departed with his whole Estate, he is no more Tenant to the Lord to avow upon; though the Lord if he will may avow upon him for the arrerages, and if the Lord after future alienation release to him all his rights in the Land, the Release is void to release the Rents and Services, in all which it differs materially from the other Case, and it is an equall proportion of the Law, That when the Lord aliens his signory, the Tenant is to be acquainted, that all Arrearages may be paid, that he may have no after-reckonings, for after notice and the Arrerages paid, the avowrie vanisheth. Now for the Heir in tayl claiming from his Ancestor after his Feoffment by descent from him, thereby allowing a right to remain in him against his Feoffment; The Case is more difficult, because during the Feoffor there can be no motion of that right, neither by the Feoffor who hath bard himself, nor his Issue, because his Right is not yet come; yet let me put this Case upon the Statute 11 H. 7. upon the opinion of Mountague Chief Justice. If Tenant in tayl Jointress make a Feoffment, the person to whom the land doth belong after her death may enter and hold it according to his right. Now till such Entry there is a discontinuance, but when the Issue enters he is an Heir intayl, et quasi eius per discent. But now generally when Tenant in tayl hath made a Feoffment and dies, the Heir shall bring a Formedon in the Discender, and shall count that descendere debet from that Ancestor that made the discontinuance per formam doni, and therefore the Writ saith dicendit jus, it is as much devenit jus.

Mich. 5 Car. Com. Banc.

It is true that regularly a Feoffment bars all former rights and future rights; yet respect to be had to Strangers. And therefore in Archers Case, Lands were demised to one for life, remainder to his first Heir male; Tenant for life made a Feoffment in fee and died, his next Heir was barred of his right for ever by the Feoffment.

Albanies Case, 1 Rep. Archers Case, 1 Rep. 66. 9 H. 7.

A man seised of Land by right of his Wife, makes a feoffment in fee, and then the Estate is made back to the Wife, she is thereby remitted, and her Husband shall never be Tenant by the Courtesie, and therefore well

Mich. 5 Car. Com. Banc. well reſolved, if Tenant in tayl diſcontinue, and levy fine with Proclamations, is no bar to the Eſtate tayl.

Now this Caſe is irregular, becauſe it ſtandeth by Act of Parliament, which is able to make the ſame Act good to one purpoſe or perſon, and void or voidable to another, as the Statute of Eccleſiaſtical perſons, and binds the party, but is void or voidable againſt the Succeſſors, and ſhall nevertheleſs when they enter, be in by ſucceſſion.

And that there is ſtill a right remaining in the Tenant in tayl, appears in that he hath ſtill in him a power to bind it more finally and totally by fine and recovery if he purſue them rightly, and therefore note Cuppledikes Caſe. If Tenant in tayl with divers remainders over make a Feoffment, and Feoffee vouch not the Feoffee Tenant in tayl in poſſeſſion but the firſt in Remainder, by the Statute the Feoffees are not bound, but are remitted; and Maunſells Caſe there is cited, where one recovery is a bar to 3 ſeveral Intayls with double voucher.

And this is called jus extinguendi; which he could not extinguiſh and diſcharge, if not in him and in his power; and therefore there is no cauſe to frame Abeyances needleſs and in vain, but the Law allows not nor admits not but in Caſes of neceſsity, as in the vacancy of Biſhops, Parſons, and other Eccleſiaſtical perſons, or the like Remainders to right Heirs upon Freehold, abeyances are not allowed, but where the original Eſtate required them, or where the conſequences of Eſtates and Caſes do require them. As for the firſt in Caſe of ſingle Corporations, Biſhops, Deans, and Parſons which muſt dye, and a vacancy of freehold or a Remainder to the right Heirs of I. S. yet living. Or Secondly in Caſe of congruity, as if a man gives a Warranty and die, his Heir in ventre ſa mere may not be vouched, but if there be Heir he may be vouched, and a Vouchee may take and plead a Releaſe quaſi tenens, or may leaſe a Fine to the Defendant of the Land in Queſtion.

But for Eſtates that of their own nature and origination, creation, are perfect and intire as this Eſtate entayl is, the Law permits not vain affected abeyance or fictions by the voluntary Act of the party, as this, to no good, which ſhould preſerve a right to ſerve the Heir, and to defraud the King, which was one of the principal reaſons for the making the Statute 27 of H. 8. for the transferring of uſes into poſſeſſion; Uſes being but a kind of abeyance and ſhift to keep the profits to the uſe, and defraud the King and Lords of their Eſcheats, and them that had a right to know againſt whom to bring their Actions. Littleton was confounded in himſelf when he made an abeyance of totum ſtatum ſuum, and yet made an Eſtate for life, which is condemned in Walſingham's Caſe by the Judges. Again, though fictions take place amongſt common perſon, the King is not bound by fictions, and therefore the King is not bound by his remainders by recompence feigned upon a common recovery, warrant collateral binds not the King, but warranty with real and actual Aſſets, nor the King is not bound by Eſtoppels of his own recitall certa ſcientia, as it is in Altenwoods Caſe.

And I hold plainly, that as the Land in poſſeſſion is diſtinctly and literally given to the King, ſo the right is as literally directly and plainly given to the King by diſcharge of that ancient right whereof formerly it was bound; for when the Statute ſaith, that the King ſhould have the Lands, ſaving the right of all perſons, other than the Offenders and their Heirs, and ſuch as claim to their uſe, it is plain, that the eye of the Statute was not only upon the Land in poſſeſſion but alſo the rights to the ſame, the one in point of Giving, The other in point of renouncing.

The Land in poſſeſſion could be but in one, that is in the Offenders, and ſo it was given, but the rights to the ſame Lands might be in ſun-

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by perſons in the Offendor, or in his Heirs, or in Strangers.

Mich. 5 Car. Com. Banc.

Now when the Statute ſaith the King ſhall have the Land without ſaving the Rights of the Offendors or his Heirs, or any claiming to their uſe, Tenant in tayl diſcontinues, and after diſſeiſeth his Diſcontinuee, and is attainted of Treaſon, he forfeits his Eſtate gained by the Diſſeiſin, and alſo his right of Entayl, for he cannot take benefit of his ancient Right againſt the King, by force of the Statute of 26 H. 8. and 32 of H. 8. and this agrees with the reaſon, and the rule in the Marqueſs of Winchesters Caſe; for if the Traytor have right to a Strangers land, that ſhall not be given to the King for the quiet of the Stranger being Poſſeſſor for the quiet of his poſſeſsion, but ſuch right ſhall be given to the King being Poſſeſſor for the quiet of his poſſeſsion, and the word Hereditament in the Statute 26 H. 8. are both ſufficient and fit to carry ſuch right in ſuch Caſes, and no man will diſpute but they are ſufficient to ſave naked rights to the Lands of ſtrangers, therefore it is not for the count of words, but becauſe it is alleged it was not meant, ſo it was ſaid in Digbies Caſe, and ſo hath Antiquity expounded it for the good of the Subject againſt the King, and againſt the letter of the Law. But can any man imagine that the Parliament that gave the Land to the King ſhould leave a right in the Traytor, in the ſame Land, to defeat him again of it, ſince the Statute gives the right and the Land, and this gives a forfeiture of all rights belonging to the Perſon attainted of Treaſon and their Heirs, for the benefit of the Kings forfeiture is of ſo great importance, that if it be not taken as large as I take it, it is an avoiding of all the Statute, even that 33 H. 8. cap. 20. for though they have the word Rights in both Statutes, even that of 33. doth not include the right of Action to the Lands of Eſtrangers by an Equity againſt the Letter. So for this time the Caſe was abruptly broken off, by reaſon the King had ſent for all the Judges of every Bench.

Springall againſt Tuttersbury.

IN Springall and Tuttersburies Caſe. It was agreed by the Court, If a verdict be given at a niſi prius, and the Plaintiff or Defendant die after the beginning of the Term: yet Judgement ſhall be entred, for that relates to the firſt day of the term.

Overalls Caſe.

ONe Overall was ſued in London, and for that that he was of the Common Bench, a Writ of Privilege iſſued, which is a Superſedeas, and ſtaid the Sute wholly, and not removed the Cauſe; And if the Plaintiff had cauſe of Action he ought to ſue here. And then by the courſe of the Court, a Clark ſhall not put in bayl.

Foxes Caſe.

THe Lord Keeper in the Star-chamber cited one and Butchers Caſe to be adjudged 38 Eliz. An Under-Sheriff makes his Deputy for all matters except Executions, and reſtrained him from medling with them. And it was adjudged a void Exception. So if it be agreed and covenanted between them, that the Deputy ſhould not meddle with matters of ſuch a value, It is a void Covenant. And that was agreed by Richardſon to be good Law.

Hil. 5 Car. Com. Banc.

Overalls Caſe.

IT was agreed at another day in Overalls caſe by all the Clarks and Prothonotaries of the Court, that the Courſe always was, that if an Atturney or Clark be ſued here by bill of Privilege, he needs not put in bail. But if he be ſued by original, and taken by a Capias, as he may be if the Plaintiff will, Then he ought to put in bail. quod nota.

MEmorandum, that on Sunday morning in the next term enſuing, which was the 24. day of January. Sir Henry Yelverton, puiſne Iudge of the Common Bench dyed, who before had been Attourney general to King Iames; and afterwards incurring the diſpleaſure of the King, was diſplaced, and cenſured in the Star-chamber, and then he became afterwards a practicer again at the bar, from whence he was advanced by King Charls to be a Iudge. He was a man of profound knowledge and eloquence; and for his life of great integrity and piety, and his death was univerſally bewailed.

Termino Hill. 5 Car. Com. Banc.

Honora Caſon againſt the Executor of her Husband.

HOnora Caſon ſues Edward Caſon Executor of her Husband, and declares by bill original in nature of debt pro rationabili parte bonorum, in the Court of Mayor and Aldermen of London, and alleges the cuſtom of London to be, That when the Citizens and Frœmen of London die, their goods and chattels above the debts, and neceſſary funeral expences, ought to be divided into three parts, and that the wife of the teſtator ought to have the one part, and the Executors the ſecond part to diſcharge Legacies, and diſpoſe at their diſcretion; And the children of the Teſtator male or female, which were not ſufficiently provided for, in the life of the Father, to have (notwithſtanding the Legacies in the will) the third part. And the cuſtom is, that the Plaintiff in this action ought to bring into the Court an inventory, and ſue before the Mayor and Aldermen; And that ſhe had here brought an Inventory, which amounted to 18000 l. ſo that her third part was 6000 l, and demanded it of the Executor, who unjuſtly detained, &c. And it was removed to the Common bench by writ of Privilege. And now Hitcham Serjeant moved for a procedendo. And the Court ſeemed to be of the opinion to grant it. Becauſe that the cuſtom is, that the ſute ought to be before the Mayor and Aldermen, and then if they retain the action here, the cuſtom would be overthrown. But they agreed that a rationabile parte bonorum may be remanded here, and that they may proceed upon it in this Court; And that there be divers preſidents to this purpoſe. And they agreed that a rationabile parte bonorum is the original writ by the Common Law, and not grounded upon the Statute of Magna Charta. But that it does not lie, but where ſuch a cuſtom is, which cuſtom they ought to extend to all the Province of York beyond Trent. Richardſon chief Juſtice ſaid, that in the principal caſe. The Plaintiff in London might have declared without alleging the cuſtom. As it is in 2 H. 4. Becauſe that the cuſtom

ſtom is well known. But otherwiſe, where an action is upon the cuſtom, in a place where the cuſtom does not extend; There it ought to be ſhewn. And afterwards, at another day, a procedendo in this caſe was granted.

Where cuſtom ought to be ſhewed, and where not.

Sir William Cave againſt Sir William Fleetwood.

Hill. 5 Car. Com. Banc.

IN debt the Plaintiff had judgement, and a cap. ad ſatisfac. was awarded againſt the Defendant, upon which he was outlawed. And Crawley moved that the Plaintiff might have an Elegit, and cited 21 H. 7. 19. There are but four manners of Execution Two by the Common law, levari and fieri fac. And two by the Statute, elegit and capias, and none of them is a barre to the other, unleſſe there be ſatisfaction of it. 22 Aſſ. 47. E. 3. Exec. 41. If the party pray execution of the body, and had it, then he ſhall not have reſort to a new Execution; For if the Defendant die in priſon, it is adjudged in Bloomfields caſe, that the Plaintiff ſhall have an Elegit, which proves that it is the ſatisfaction the Law looks upon, and reſpects. A fieri fac. is no barre to the capias, although part of the debt be levied by fieri fac. and a capias may iſſue after. Secondly the proceſſe is determined by the Outlawry, although it be after Judgement And for that the Plaintiff reſorts to his ſatisfactory execution again. 17 E. 4. 4. Execution by Statute does not ouſt execution by the Common law, no more than the execution by one Statute ouſts the execution by another. Hutton Juſtic. If upon an Elegit brought, it be executed, he can never have an execution; And if a man be taken upon a capias, the party now may have another execution; but the outlawry here determines the proceſs, and then the Plaintiff by ſcire fac. revives the Judgement again, and he may reſort to which proceſs he will. If a man had a Judgement, and taken a capias, and done nothing upon it, but died, the Executor is not bound by that. But after a ſcire facias he may have an Elegit, or what other execution he will. Hudſon and Lees caſe, Common Bench. The Plaintiff took an Elegit, but becauſe he could not (upon the Inquiſition find ſufficient to ſatisfie, he reſorted to a capias. And it was agreed that he might, for that, that the Elegit was not awarded upon Record. But if an Elegit be awarded by the Roll, and ſo ſhall be recorded, the Plaintiff ought to proceed upon that. But the courſe is not to award it upon the Roll; and he ſaid that Bloomfields caſe is not Law. For if the party die in execution by Elegit by capias, the Plaintiff had his execution, and might not have any execution again. And ſo it was adjudged in Jackſons Caſe in this Court. And the making of the Statute of 21 ac. ſhews that ſo the Law was taken.

A fieri fac. is no barre to the *cap.* although part of the Debt be ſatiſfied.

Wollaſton Dixye againſt the Bailiffs and Burgeſſes of Derby.

IN a quare impedit, the Plaintiff declares that Juſtice Beamont was ſeiſed in Fee of the Advowſon, of St. Peters in Derby, and preſented his Clerk to it, who was inſtituted and inducted, &c. and dies, and that the Advowſon deſcended to H. Beamont his ſon and heir. and he died, and the Advowſon deſcended to Barbara his daughter and heir, and that ſhe being ſeiſed in fee, and under the age of 21 years, the Church became void, and Barbara her Mother, who had not any right of preſenting, preſents her Clerk, who was inſtituted and inducted and admitted to it. And Barbara the Daughter took the Plaintiff to Huſband, and became of full age, and then the Church became void. And becauſe the Bayliffs and Burgeſſes preſented, and the Church ſo full within the ſix

Hill. 5 Car. Com. Banc.

mon this, the husband alone brought that action, upon which there was a demurrer. Davenport said the action did not lie for the husband alone, but the wife ought to joyn with him. For that uſurpation upon the Infant which he had by deſcent, by the Statute of Weſt. the 2d. does not turn the Infant to his writ of right. Yet the Uſurper gets the inheritance, and turns his eſtate to a right. And for that he cited Cook, 6. 50. Boſwells caſe, and 16. E. 3. there cited. Where one ſeiſed of a Mannor with an advowſon appendant dies, his heir within age, who ſuffers an uſurpation, and then grants the Mannor, Reſolved that the advowſon does not paſſe, becauſe that the heir had but a right in the advowſon after the uſurpation. So in our caſe, the wife had but a title of action: and then the wife ought to join. As where an obligation is made to a woman who takes a husband; the wife ought to joyn with the husband in the action upon the obligation. But Henden ſaid, that the Husband only might have an action. If a feme covert be ſeiſed of an advowſon in fee, and the Church void, the husband only may have an action without queſtion. Which was granted by the Court. Then here, the wife being of full age before the avoidance, now the feme being in poſſeſsion of the Advowſon again to all intents and purpoſes. And for that by the expoſition of the Statute of Weſtminſter, the force of the uſurpation being upon the Infant, who had it by deſcent, continued but during the incumbency and non-age of the Infant. And it was ſaid by Richardſon, That the Infant at full age might preſent, and ſo regain the poſſeſsion without action, at the Common Law, by uſurpation ſhe was turned to her writ of Right. And if it was a purchaſe, he was without remedy. Now I demand in this caſe, If there be a death during the avoidance, whether the Executor ſhall have it, or the Husband upon tenant by Courteſie. And he cited the Lord Stanhops Caſe; which was, That the Abbot of the Monaſtery of Shelford, was ſeiſed of the advowſon in groſs, and there was an uſurpation in the time of the Abbot; And then came the Statute of diſſolutions, which gave a right, and title to the King; So that that which was in the Abbot was now in the King. Afterwards the King grants that Advowſon by a general grant without recital of the caſe. And adjudged a good grant. But by Hutton, Warberton, and Winch Juſtices, were of the contrary opinion to Hubbard; But that was becauſe that there are words in the Statute; that the Subject ſhall have all the King had; which was to induce purchaſers. Hutton, If it might appear that the Plaintiff (ſcil.) the Husband, preſented before the Uſurpation, and was diſturbed; that perhaps would have been a claim, and ſo a remitter. For at the Common Law, the remedy for an Infant, was to preſent, and upon admiſſion and Inſtitution, &c. of his Clerk he ſhould be remitted, or might have a Writ of right if he pleaſed. But by the Court, the husband only in this caſe might have preſented; And then upon diſturbance, he only ſhall have the action. But here the Church was full before the preſentation. Henden ſaid, the intention of the Statute was to give to the Infant at full age all his Intereſt which he had before uſurpation, During the life of the Incumbent, and non-age of the Infant, the Uſurper had an Eſtate in fee. But after the death of the Incumbent, and full age of the Infant, the Eſtate of the Uſurper ceaſed. And the reaſon is upon the Statute of Weſtm. 2. Infans habeat eandem poſſeſſoriam actionem qualiter anteceſſor. And 33 H. 6. 42, is, that an Uſurper puts an Infant out of poſſeſsion; But that ought to be underſtood during the Infancy only, Et adjournatur.

Infans habeat eandem actionem poſſeſſoriam qualiter anteceſſor.

Raw-

Hil. 5 Car. Com. Banc.

Rawlins's Caſe.

HE was Plaintiff in a Replevin and was non-ſuted after Evidence given to the Jury, and the Jurors did not find Coſts and Dammages; And afterwards a Writ of Enquiry of dammages was granted. And Aſhley moved, that the writ might not be filed. Becauſe that the Writ of Inquiry of dammages could not iſſue, but awarded from the Court; And the Plaintiff here being non ſuted was out of the Court, and that nothing might be done againſt him. And the Prothonotaries ſaid, That in Caſe of a Verdict, where the Jurors omit to find dammages, a Writ of Enquiry is many times granted. But they were commanded to ſearch for Preſidents in Caſe of a non-ſute. Richardſon cited one Grimſtons Caſe in the Kings Bench. Which was, one Plaintiff in Action upon the Caſe againſt an Inne-holder was non ſuted, and the Declaration was inſufficient. And for that the Plaintiff might not have coſts. But by Henden, It is ordinary now in the Kings Bench; If the Defendant had a Verdict, although the Declaration be inſufficient, Yet he ſhall have Coſts.

Writ of Enquiry may be granted after a verdict, when Jury omit the dammages.

Nurſe againſt Pounford.

NUrſe a Barreſter of Grays-Inne, brought an Action upon the Caſe againſt Pounford. And declares, that he is a Counſellor, and was of Councel with ſeveral Noble men, and that he was Steward to the Lord Barkley of 20 Mannors, and alſo the receiver of his Rents for thoſe Mannors; And that the Defendant maliciouſly, intending to diſgrace him to the Lord Barkley, writ an infamous Letter againſt him to the Lord Barkley; Which Letter was here recited, and it was to this effect briefly, ut ſequitur. (ſcil)

Your wonted Courteſie to Strangers incourageth me to deſire your Honor not to protect your Steward in his unlawfull Sutes. He hath unjuſtly vexed his own Brother by Sutes, and cauſed him to be arreſted and taken out of his Bed forcibly by Catchpoles; He hath likewiſe almoſt undone me, who have maried his own Siſter, notwithſtanding his entertainment at my Houſe, for himſelf, Wife, Servants, and Horſes for ſeveral years. And now inſtead of payment, thinks to weary me out with Vexations and Sutes at Law. I hope your Lordſhip will give no countenance to him in theſe things.

By reaſon of which Letter the Lord Barkley turned him out of his Office. The Defendant pleads not guilty, which was found for the Plaintiff. And it was moved in arreſt of Judgement, that the Action here would not lye. Arthowe ſaid, that the Action would lye well, by reaſon of the particular loſs the Plaintiff had. And that is proved by Anne Davies Caſe, Coo. 4. Such words that there are ſpoken of a maried woman, are not actionable; But of a Feme ſole who had a Suter, the Action will lye. If one ſaid of a Feme ſole, That ſhe is a Whore, and ſuch a mans Whore; It will not bear an Action in our Law: But in the Spiritual Court it will. And perhaps for Whore generally there. And in the Caſe of Anne Mayes there was a loſs of preferment which ſhe might have. But here the Plaintiff loſt the preferment which he had. If a man ſaid to the Ordinary of a Clark preſented to him, that he is a Baſtard, ſeditious or heretique, by reaſon of which words the Ordinary refuſes him; An Action lies for the Clark, for the temporal loſſe; and he cited Butchers Caſe and Stewkleys Caſe, Cook 4. Alſo he cited Sir Gilbert Gerrards Caſe, Cook 4. 18. If one ſaid, Take not a Leaſe of ſuch an one, I have a Leaſe of it,

Hil. 5 Car. Com. Banc.

it, an Action does not lie. But if the party by reaſon of thoſe words could not demiſe it to one with whom he had Communication for the Leaſe; Then it lies. Or if he ſaid that another had a Leaſe of that, alſo an Action lies, 6 E. 6. Dyer 72, One ſaying that a Merchant would be a Bankrupt is Actionable; Becauſe that no man will truſt him, 7 E. 3. 24. One threatens another if he will come abroad he will beat him; For the threatning an Action does not lie; But if for that Cauſe he could not go abroad about his Buſineſs, an Action will lye.

Secondly, It hath been objected, that the Action does not lie, Becauſe that it appears that the Letter was written out of the time of Limitation, by the Statute of 21 Jac. which is for Slander. That the Action ought to be brought within two years after the Slander. I agree, if it be brought for ſlanderous words. But this is an Action upon the Caſe only. An Action upon the Caſe for ſlandering of a Title is not within the Statute 21 Jac. for the two years, but for the ſix years. So here the Action is not for ſlanderous words; For the Letter does not bear an Action. But for the temporal loſs. But it was reſolved by the Court, That the Action did not lie. For by Richardſon Chief Juſtice, In all Caſes where you will maintain an Action, for words, there ought to be ſome particular words of Slander ſpoken or written, by which the particular loſs came. Here is a Letter it had not any Slander in it; And it cannot be conceiceived that the Lord turned him away out of his Service or Office by that Letter, which does not touch him in his Office of Stewardſhip nor his Receivorſhip. If he had written that the Plaintiff was a contentious and troubleſome man, that had been more queſtionable than this is; Yet it would not bear an Action. And Richardſon ſaid, that they alwaies conceived Sir Gilbert Gerrards Caſe not to be Law. For if a man ſaid that he himſelf had a Title to the Land of an other, it is not actionable, although he loſt by that. But if he had ſaid, that another man had Title to the Land of another, that is actionable. And no Caſe can be ſhewen, where an Action upon the Caſe lies upon a particular loſſe, unleſs the words carry ſome ſlander with them. Hutton ſaid, the words of the Letter are not actionable. But if being ſaid to be done maliciouſly and falſely, and to the intent the Lord Berkley ſhould put him out of his place, and upon that the Lord diſplaced him, then there would be more doubt of it. But here the Jury had found the Defendant guilty, and that ſeemed only to the writing of the Letter, and it might be falſe notwithſtanding. But if the Jury had found that all was falſe, and written of ſet purpoſe, and that for that the Lord diſplaced him, it would be more difficult. But for any thing as appears to us, there is not any thing for which he might be juſtly diſplaced. And alſo it was not ſaid in the Declaration that the Defendant had any fee for his Office. And Richardſon alſo ſaid, That if it had been found as my Brother Hutton ſaid, Yet it is known that it ſhould be more ſtrong. But then I conceive that the Action does not lye. For it is apparent that nothing in the Letter may be applyed to a particular misbehaviour in his Office. And by the Court, Although the Declaration be laid falſely and maliciouſly; Yet if the words be not ſcandalous, yet it ought to be laid falſely and maliciouſly. And he ſaid that it was adjudged in this Court, Where an Action upon the Caſe was brought for conſpiracy to indict a man, and upon the Indictment the Jury found Ignoramus. There the Indictee was clear; And yet for the conſpiracy the Action laid, which was Blakes Caſe. And it was ſaid by Hutton, If I have Land which I intended to ſell, and one came and ſays maliciouſly, (and on purpoſe to hinder my ſale) that he had a Title to it. That that is actionable, Which Harvey agreed without Queſtion, if he does not prove that he had a Title; If one ſays of an Inne, Go not to ſuch an Houſe, for

it

it is a very cutting Houſe. Agreed by the Court not Actionable. And Judgment was given quod querens nil cap. per bil. *Mich. 5 Car. Com. Banc.*

Paſc. 6 Car. Com. Banc.

THis Term there was nothing worthy the reporting, as I heard of others; For I my ſelf was not well, and could not hear any thing certum reſerre, &c.

Trin. 6 Car. Com. Banc.

Tomlins's Caſe.

IF the Husband makes a Feoffment to the uſe of himſelf for life, the Remainder to his Son in tayl; By the Court, That is a dying ſeiſed in the Husband. For the Wife ſhall have dammages in Dower. And ſo it was adjudged in the Lady Egertons Caſe; But the Husband ought to dye ſeiſed of an Eſtate tayl, or Fée ſimple which might deſcend to his Heir.

Mich 6 Car. Com. Banc.

MEmorandum, That Sergeant Atthowe died at his Houſe in Northfolk, who was a man ſomewhat defective in Elocution and Memory, but of profound Judgement and Skill in pleading.

NOte, it was was ſaid by Hutton and Davenport, That if an Inferiour Court preſcribe to hold Pleas of all manner of Pleas except Title to Freehold; That that is no good preſcription. For then it may hold Plea of Further, which cannot be, &c.

Note, It was ſaid by Richardſon chief Juſtice, that if two conſpire to indict an other of a Rape, and he is indicted accordingly; If the Jury upon the Indictment find Ignoramus; Yet that Conſpiracy is not puniſhable in the Starchamber.

Father purchaſes Lands in his Sons name, who was an Infant at the age of ſeaventeen years, and he would have ſuffered a Common recovery as Tenant to the Præcipe. But the Court would not ſuffer him.

Rawling againſt Rawling.

THe Caſe was thus, A man being poſſeſſed of a Leaſe for 85 years, deviſes it as follows (viz.) I will that R. Rawling ſhall have the uſe of my Leaſe, if he ſhall ſo long live, during his life, he paying certain Legacies, &c. And after his deceaſe I deviſe the uſe thereof to Andrew Rawling the reſidue of the term with the Leaſe, in manner and form as R. Rawling ſhould have it. Crew ſaid, That after the death of R. Rawling and Andrew, the term ſhall revert to the Executors of the Deviſor. But by the Court, not. But it ſhall go to A. Rawling the laſt Deviſee, and

Hill. 5 Car. Com. Banc.

and in manner and form ſhall go to pay Legacies. And by all a ſtrong Caſe. And together with the Leaſe, be by ſtrong words.

The Archbiſhop of Canterbury againſt Hudſon of Grays-Inne.

The Archbiſhop of Canterbury proſecuted againſt Hudſon of Grays-Inne, in an Information upon the Statute of E. 1. of Champerty. Henden Sergeant for the Plaintiff moved upon the Plea, that it was inſufficient, Becauſe that the Defendant had prayed Judgement of the Writ, when he ought to have pleaded in Bar; For the Statute of E. 1. had appointed a ſpecial Writ in this Caſe, as the Defendant ſaid. But by him the Information is upon the Statute of 32 H. 8. which gives that Action by ſute in Chancery, which before was only by ſute at Common Law. Richardſon chief Juſtice ſaid, That the Plea is not to the matter, but to the manner; for the Plaintiff had miſtaken his Action. For the Action is given to the King only. And therefore ſaid to Henden, demur if you will. The Caſe was that the Defendant purchaſed Lands in anothers Name, hanging the Sute in Chancery for it; And after rules for Publication was given in the Cauſe.

Malins Caſe.

An iſſue miſtaken cannot be amended.

AYliff moved in arreſt of Judgement, in an action of Battery, &c. And the cauſe that he ſhewed was; It was brought againſt William Malin of Langlee, and in the Record of niſi prius, It was William Langley of Malin: But by the Court it ought to be amended; For it is a miſpriſion apparently of the Clark. For the whole Record beſides is right; And the Record of niſi prius ought to be amended by the Record in the Bench, according to the 44 E. 3. But if the iſſue had been miſtaken otherwiſe it had been.

Arrerages for rent upon an eſtate for life, cannot be forfeit by Outlawry.

NOte, That it was agreed by the whole Court, That arrerages of rent reſerved upon an Eſtate for life, are not forfeited by Outlawry, becauſe that they are real, and no remedy for them but a diſtreſs, Otherwiſe if upon a Leaſe for years, &c.

Hill. 6 Car. Com. Banc.

MEmorandum, that this term Sir Humfrey Davenport puiſne Judge of the Common Bench, was called into the Exchequer to be Chief barron.

Browns Caſe.

AN Information upon the Statute of 5 Eliz. pro eo, that one Brown was retained an Apprentice in Husbandry until the 21 year of his age, and that he before his age of 21 years went away; And the Defendant, abſque ullo teſtimonio detained him contra formam Statuti, And by Hutton and Harvey Juſtices, only ſhewed the branch of the ſaid Statute, which ſays, And if any ſervant retained according to the form of this Statute

tute depart from his Maſter, &c. And that none of the ſaid reteined perſons in Husbandry, until after the time of his reteiner be expired ſhall depart. That is not to be intended of an Apprentice in Husbandry, but of an hired ſervant. For the Statute did not intend to provide for the departure of an Apprentice, becauſe that an Apprentice ought to be by Indenture. And then a writ of Covenant lies upon his departure, to force him to come again. And by the Common Law, an action upon the caſe lies, for retaining the ſervant of another. And by them the retainer without being teſtimonial, which is an offence againſt that Law, is after the years of reteiner expired; For ſo are the words of the Statute. But they ſaid that the Information was naught; becauſe that it does not appear, that the Defendant did not retain him out of the Pariſh where they ſerved before. For the Statute ſays, out of the City, Town, or Pariſh, &c. except he have a teſtimonial. And the words ſecundum formam Statuti will not aid it. And in the ſame Village or City, &c. The Statute does not require a teſtimonial, becauſe that there it was known, &c. And for theſe reaſons after here ſaid for the Plaintiff, Judgement was ſtayed, if, &c. *Hil. 6 Car. Com. Banc.*

Jennings againſt Couſins.

Lib. 4. 355

IEnnings brought a Replevin againſt Couſins, who avowes for damage feaſant, The Plaintiff replies, that poſt captionam & ante deliberationem he tendered 3 s. which was a ſufficient amends for the Treſpaſſe and the Defendant notwithſtanding detained his Cattel contra vadum & pleg. &c. Upon which they demurred. And by the whole Court the Replication is naught. For Pilkintons Caſe is agreed to be good Law: that the tender ought to be before pounding, but any time before the impounding it is ſufficient. But here ante deliberationem implies that the Cattel were impounded, and it is not ſhewn in certain that the tender was before. And it was agreed in treſpaſs, That the Defendant may plead the Treſpaſs to be involuntary, and diſclaim in the Title without pleading the Statute of 21 Iac. for the Statute is a general Statute. Whereupon Judgement was given for the Defendant. *2 Cub. 1596 3 Lib. 190*

Butts againſt Foſter.

THe Plaintiff in an Action upon the Caſe, the Plaintiff declared, That whereas he was a man of good fame, carriage, and behaviour, and free from all blot or ſtain. Yet the Defendant with purpoſe to draw his life in Queſtion, and traduce him amongſt his Neighbours, in preſentia multorum, &c. crimen felonæ ei impoſuit, & ea occaſione illum arreſtari cauſavit, et per ſpatium duarum dierum in cuſtodia detineri & coram Iohanni Petryman uno Juſtic. ad pacem, &c. duci procuravit & nequiſſime proſecutus eſt, &c. The Defendant pleads not guilty, which was found for the Plaintiff. And Hitcham moved in arreſt of Judgement, that the Action would not lie: And of that opinion was Hutton, becauſe that he did not proceed to indictment; For there an Action of that lies in the nature of a Conſpiracy. But if an Action ſhould lie here, it would be a miſchievous Caſe; for by that every man would be deterred to queſtion any perſon for felony. And it was ſaid by Hutton. If one ſaid, You have broken the Peace, and I will cauſe you to be arreſted, and procures a Warrant from a Juſtice of Peace, by which he is arreſted. No Action here will lye. But Berkley on the other ſide ſaid to the contrary, and of that Opinion was Richardſon Chief Juſtice, that the Action will well lye. And by Richardſon, The Defendant ought to have juſtified, that there was a Felony done, and that he ſuſpected him, &c. But he pleads not guilty.

Hill. 6 Car. Com. Banc.

ty. And it does not appear by the Declaration what was done with the Plaintiff, after he was brought to the Juſtice of Peace, and by that it ſhall be implyed, that he was diſmiſſed upon his examination. And here the Plaintiff was impriſoned, and carried before a Juſtice of Peace; which is an act done as well as in the caſe where there is an Indictment. And an Attourney of the Court cited one Danvers and Webly's Caſe, In that very caſe it was adjudged that the Action lay. But it was adjourned to another day.

Champues Caſe.

One Unſon makes his will & gives 200l. to Tho. Champues ſon of Jeremie Champues, Alſo to other Children of Jeremy 20l. a piece to be paid at their ſeveral marriages, or ages of 21 years. And after wills that his Executor ſhould enter into bond to the ſeveral parents, to pay the ſeveral Legacies to the ſeveral Children at the ages of 21 years, or their marriages. And his Executor after his death, gave an Obligation to Jeremy Champues to pay the 200 l to Thomas at his full age or marriage. But in the Spiritual Court afterwards upon libell it was ordered, that he pay the legacies preſently. Thomas being under age, of tender years. And for that Henden moved for a prohibition. Richardſon, although the ſute for a Legacy be properly in the Spiritual Court; yet if there be an Obligation given for the payment of it, it is now turned to a duty in the Common Law, and then it is not tryable there. This is one reaſon why a prohibition ſhall be granted. Secondly, another reaſon is; becauſe that they ſentenced the payment of the Legacy againſt the Will, and againſt Law, and the Obligation here will not alter the caſe; for it is given to another perſon, not to the Legatee, and then the Legatee, notwithſtanding the Obligation may ſue in the ſpiritual Court. But by Richardſon it is all one, for here the Will orders the Obligation to be made. Which Hutton changing opinion, and Harvey agreed. For now becauſe the Obligation is given, if the ſentence ſhall be given, the party is liable to the Obligation alſo, to perform that. And by Richardſon it ſeemed that the clauſe in the will of the Obligation to be entered into by the Executor, to pay at the marriage, or 21 years of age, the ſeveral Legacies, &c. extends to the firſt Legacy of 200 l. to Thomas, although it be coupled to the laſt Legacy, which ſhould be by a new and ſeveral Item. And by that clauſe the intention of the Teſtator appears, that the 200 l. which is given generally, and no time of payment named; It ſhall not be paid until marriage of 21 years of age. And a prohibition was commanded to be granted.

Note, It was ſaid by Richardſon chief Juſtice, If a man had a way over the Land of another for his Cattel; and upon the way he ſcares his cattel, ſo that they run out of the way upon the land of the owner, and the party who drives the Cattel freſhly purſues them, &c. That in Treſpaſſe he who had the way might plead this ſpecial matter in juſtification.

Green againſt Brouker and Greenſtead.

In Trover and reverſion the Plaintiff declares; That whereas he was poſſeſſed of a bag of hops, and a bag of flax to the value of, &c. And that the Defendant found them, and the third day of October converted them, And the Defendants plead that Sandwich is an antient Village, and that the cuſtom of foreign attachment is uſed there as in London, and that theſe goods were loſt upon default in November, and tra-

traverſes abſque hoc that they were guilty of any converſion in October, or any other time or day than the times before, which are contained in the Declaration. That the Defendants were guilty before, (ſcil.) October, Upon which the Defendants demurre, and Judgement was given for the Plaintiff, Although it was objected that the Juſtification here, by the Cuſtom before had taken away the property, And I ſhall be debarred in Detinue, and ſo in Trover. But the Court was of the contrary opinion, That the Defendants Plea in barre here ſhall not be good without traverſe, as it is, and therefore the time is not made material, but any time before is ſufficient. Per poſſeſſion ſufficeth to maintain a Trover. *Paſc. 7 Car. Com. Banc.*

Paſc. 7. Car. Com. Banc.

Eaglechildes Caſe.

FInch Sergeant ſaid, that 6 Car. in the Kings Bench it was ruled, upon Bill of Exchange between party and party, who are not Merchants, There cannot be a Declaration upon the Law of Merchants, but there may be a Declaration upon the Aſſumpſit, and give the acceptance of the Bill in Evidence

Crompton againſt Waterford.

WAterford was ſued in the Spiritual Court for ſaying theſe words of the Plaintiff, ſhe will turn tayl to tayl with any man, intimating that ſhe would be naught with any man: And ſentence was given for the Plaintiff. Whereupon he appealed to the Delegates propter gravamen, And the Delegates overruled it, and aſſeſſe coſts for the wrong appeal. Then there was a prohibition granted, becauſe the words were idle words, and not puniſhable in the Spiritual Court. Hutton ſeemed, That the coſts taxed by the Delegates are not taken away by the Prohibition. Richardſon on the contrary. For the principal is prohibited, and the coſts are incident. And becauſe that a prohibition ſtaps all proceedings, the coſts are taken away. If the coſts are to be executed by the Delegates, then the prohibition to them will help: But if the coſts are remanded to the inferiour Court as well as the cauſe, then the prohibition to the Inferiour Court will help. So quacunque via data the coſts are to be diſcharged. And the party if excommunicat be diſſolved. And ſo agreed by the Court.

Alleſton againſt Moor.

ALleſton an Attourney of this Court brought an action upon the Caſe againſt Moore for calling him cheating knave, and it was not upon ſpeaking of him as an Attourney. And for that by the Court in arreſt of judgement, If it is not actionable, If he had ſaid, you cheat your Clients, it would be actionable. One ſaid, That my Lord Chief Baron cannot hear of one ear colloquio præhabito of his adminiſtration of Juſtice; And it was adjudged actionable. Otherwiſe it had been if they had had no diſcourſe of his Juſtice.

Trin. 7 Car. Com. Banc.

Coxhead againſt Coxhead.

IN Debt upon an Obligation, the Condition was to perform an Arbitrament, and the Defendant pleads nullam fecere arbitrium, The Plaintiff replies that they made ſuch an arbitrament, and recites it, the Defendant rejoyns, that the Condition was to make an arbitrament of all things in controverſie, and that other things were in controverſie, whereof no arbitrament was made. The Plaintiff ſur-rejoynes, that the Defendant did not give notice of thoſe, upon which iſſue was taken, and no place alleged, where notice was given. And that exception was moved in arreſt of Judgement. And upon that Judgement was ſtaied.

Trin, 7. Car. Com. Banc.

NOte, It was ſaid by Richardſon Chief Juſtice, If a man ſends his ſervant to a Draper to buy cloath for his Maſter, and makes not the contract in his own name: That the Maſter ſhall be charged, and not the Servant. Which was not denied 11 E. 4. 6.

Tomlinſons Caſe.

IF an Executor is ſued in the Eccleſiaſtical Court for a Legacy; and the Executor pleads plene adminiſtravit, a Prohibition ſhall not be granted, if they will not admit that plea. For they ought to judge there, if he had adminiſtred fully or not. But upon ſuggeſtion that they did not reject any adminiſtration, which our law allows; A prohibition ſhall not be granted; as Richardſon ſaid; which was not denied by the whole Court

Williams againſt Floyd.

WIlliams was Plaintiff by an Engliſh Bill to the Council of Marches againſt Floyd, in the nature of Debt upon an Eſcape, and there was a Latin Declaration upon an Eſcape turned into Engliſh, becauſe that the Defendant, being Sheriff of Canarvan, ſuffered one, againſt whom the Plaintiff had a Judgement (being taken by capias utlegat.) to eſcape, To his damage of 40 l. And by the whole Court a prohibition was granted; Although that by their Inſtructions, they had power of perſonal actions under 50 l. For this is intended a meer perſonal action. As debt, detinue, &c. But Debt upon a Judgement, or debt upon an eſcape, or upon the 2 E. 6. for not ſetting forth of tithes, an action upon 8 H. 6. or any other action upon matter of Record or Statute; In ſuch caſes they have not Juriſdiction. And the Defendant there might have pleaded nul. tiel. record, and then he might have proceeded further. But the miſdemeanour here, in permitting the party to eſcape, might have been puniſhed there by Information.

Gee

Trin. 7 Car. Com. Banc.

Gee againſt Egan.

GEe an Attorney of this Court brought an Action upon the Caſe againſt Egan, and declares, that he was an Attorney for many years late paſt, and ſtill is, and that he had taken the Oath of an Attorney to do no fraud nor deceit, in his Office as Attorney. And that colloquio habito et moto inter one Riſe Brother in Law to the Plaintiff, and the Defendant, concerning the Office of the Plaintiff as an Attorney, and concerning a Bill of Coſts and Expences, by the Plaintiff in defence of a Cauſe proſecuted by one Treddiman in the Common Bench againſt the Defendant laid out and expended; The Defendant 1 Auguſti 4 Car. ſpoke theſe words to Riſe, Your Brother and Mr. Treddiman have cheated me of a great deal of mony, &c. by which the Plaintiff is in danger to loſe his Office. And it was moved (after verdict for the Plaintiff) in arreſt of Judgement by Ayliff. Becauſe that here is not any certainty in the Declaration that the words were ſpoken of the Plaintiff as Attorney; And then they are not actionable. For he does not ſhew at what time the ſpeech was of him as Attorney. Richardſon upon reading of the Record ſaid, It was true that no time of the ſpeech is ſhewen, neither is it after the ſpeech ſhewen, upon whom he ſpoke thoſe words; Which might help it. Neither is it ſaid (afterwards) that is to ſay primo die, but primo die Auguſti he ſpoke, &c. And if it can be intended, that thoſe words were ſpoken of the Plaintiff as Attorney; That would inforce the words to bear an Action. But if ſuch words are generally ſpoken of an Attourney, without ſpeech of his Office, they are not actionable. For he may be a Cheater at dice, or in a bagain, &c. And here non conſtat that the words were ſpoken of the Plaintiff as Attourney.

Secondly it does not appear that the Plaintiff was was an Attorney in the Cauſe, but ſays that there was a conference of a Bill of Coſts laid out by him, &c. and does not ſay laid out by him as Attorney. And the whole Court ſeemed to be of the ſame opinion. But it was adiourned. If it had been ſaid, that habente colloquio primo die, &c. he ſpoke, it ſhould have been good. But habito implies time paſt.

Hitcham againſt an Attorny of this Court.

HItcham Chief Sergeant of the King, brought an Action upon the Caſe againſt James Caſon an Attorney of this Court; And he declared that he was now Sergeant to the King, and ſo was to his Father, and that the King made him Juſtice of Peace for his County of Suffolk, and that he for many years heretofore, and yet, did exerciſe the Office of a Juſtice of Peace. And that the Defendant on purpoſe to diſgrace him, and to make him to be removed from being a Juſtice of Peace, in the Court openly ſpoke theſe ſcandalous words, In a matter wherein I was queſtioned at the Quarter Seſſions in Suffolk, Mr. Sergeant Hitcham being there, was Witneſs, Judge, and Party, and did there oppreſſe me. And moreover he ſaid, In Articles there preſented againſt me, he did me injuſtice, and hath contrived thoſe Articles. And moreover he ſaid, Mr. Sergeant Hitcham bound my Son Finch to the Quarter Seſſions, and there indicted him, and was Witneſs, Judge, and Party, and counts to the damnage of the Plaintiff 1000 pound. The Defendant to ſome of the words in the Declaration pleads not guilty, to the reſidue he juſtifies, and ſays that the Plaintiff was made a Juſtice of Peace 1 Apr. 1 Car. And as to the words, In a matter wherin I was queſtioned in the Quarter Seſſions in Suffolk, Mr. Sergeant Hitcham being there, was Witneſs, Judge, and Party. And all but the laſt words, That the Plaintiff at the Seſſions 8 Sept. 2 Car. at W. in Suffolk, quoſdam falſos Articulos ſcribi

Hil. 5 Car. Com. Banc.

ſcribi fecit exhibuit et produxit. And recited all the Articles being in number eleaven. And that after the exhibiting the Articles in open Court, The Plaintiff there ſaid that they were true, and counſelled the Clark of the Peace to read them, and then ſaid he ſhould be tryed upon them. But the Plaintiff denied that and ſaid, that he would proceed now no further upon them, but took the Articles and carried them with him, by which the Court was diſpoſſeſſed of them; And would not proceed againſt him upon them. And upon the laſt words (ſcil.) Mr. Sergeant Hitcham bound my Son over to, &c. He ſaid that his Son was bound to appear at the Quarter Seſsions; And cauſed an Indictment to be preferred againſt him, Becauſe he being elected Conſtable refuſed to take his oath, or to execute his office; And upon that Indictment the Sergeant gave evidence to the grand Jury, and they found the Indictment; And upon that Judgement was given, that he ſhould be amerced, that eſtreated. And upon this bar the Plaintiff demurred, Finch for the Plaintiff. And firſt he anſwers to the Exceptions which were taken before to the Declaration &c.

Firſt that it did not appear by the Declaration that the Plaintiff was Juſtice of Peace at the time of the ſpeaking of the words. To that he anſwers, That is ſufficient in the Declaration to ſhew that he was a Juſtice of Peace at the time. For it is, per multos annos jam ultime elapſos et adhinc eſt, and that the Declaration coming in M. 5 Car. If it was per multos annos ulterius, &c. It was at the time of the ſpeaking: For it was Paululum before the Action commenced. And alſo the Defendant ſays in his Bar, that the King made him a Juſtice of Peace, and that he was not a Juſtice of Peace at the Seſsions; And although that he was not a Juſtice of Peace at the Parlance, Yet the words are actionable, which charge him with Injuſtice, when he was, &c.

Secondly, It was objected, that part of the words were not alleged to be ſpoken of the Plaintiff: But the Declaration is, That in a matter, &c. Mr. Sergeant did, &c. which is directed to the firſt words. But the ſubſequent words are induced ſuch like afterwards. Ad tunc & ibidem, the Defendant ſaid, And he did me injuſtice, &c. And although the firſt words were laid to be ſpoken of the Plaintiff, yet the laſt words not. But and he did me, &c. which ought to be taken, That they were ſpoken of the Plaintiff. For it is ad tunc & ibidem, upon the ſame Communication. And alſo the Defendant cleared that. For he juſtifies thoſe words as ſpoken of the Plaintiff.

Thirdly, It was objected, that the words themſelves are not actionable. In Actions for words, it is as in Wills; The beſt argument will be from the words themſelves, yet we can borrow light from other words in the ſame Will. Which I will recite The proverbial Verſe. Quid de quoque viro & cui dicas ſæpe caveto. Quid, &c. Some words declare all malice, which are not actionable of ſome perſons they may be ſpoken of, (quo) ſome only actionable being ſpoken of ſuch a man 4 H. 8. The Duke of Buckingham hath no more conſcience than a Dog. Thoſe words upon the Statute of Scandala magnatum are actionable. 10 Iac. the Earl of Northamptons Caſe. It was reſolved in the Starchamber, that to publiſh falſe rumors of any of the Peers of the Realm was puniſhable at the Common law. And if one heard ſuch words, and reported them again, it is puniſhable, But not in a Common perſons caſe. But this difference there was reſolved; That to ſay of Commons perſon generally that he heard ſo, is not actionable, if he name the perſon. If one ſays of a Merchant he is a Banckrupt, it is actionable; not of the Defendant. If one ſaid of the Defendant he is an Ambiderter, it is actionable; not, if of a Merchant. It is a general rule, that ſlander of every man in his profeſsion is actionable; Much more of the Plaintiff in his profeſsion being a Juſtice of peace. For the words themſelves, if they be taken together or aſunder are action-

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able. The ground of the ſpeaking was, that there was a communicati- Trin. 7. Car. Com. Banc.
on of Injuries done to him by the Plaintiff, but take them aſunder, and none of them but with the circumſtances here will bear an action. Firſt, that he was a Judge, Witneſs, and party; That is againſt the Law to be Judge and party. They who are Duellifts are Judges and parties and Executioners. Judge and party is as much as to ſay he is partial, and he did oppreſſe me. That ſhews that he was not Judge and party fairly. But they have objected that this word oppreſſe is incertain; for he may be oppreſſed with overwait, or hunger and cold. But this caſe cannot have any ſuch ſuch ſence. But here it is intended the perverting of Juſtice. But this caſe was put off till the next day by nine in the morning.

Collins againſt Thoroughgood

AN action of Covenant was brought againſt the Executor and the breach aſsigned for default of reparation committed in the time of the Executor, and damages were aſſeſſed. And the queſtion was moved by Atthow whether the Judgement ſhall be de bonis propriis, or de bonis Teſtatoris. And upon view of preſidents, it was adjudged that it ſhall be de bonis Teſtatoris, For this is the Teſtators Covenant, and obliges the Executor as repreſenting him. And therefore he ought to be ſued by that name.

Waters againſt Thomſon.

IN an action of ſlander for calling him Bankrupt, Judgement was given for the Plaintiff. And it was afterwards moved in arreſt of Judgement. Becauſe that in the Declaration it is ſaid, that he was a ſeller of Wool. And Serjeant Ward ſaid, becauſe he did not allege that he was a Merchant, that it would not hold. But the Court over-ruled him.

Tomkin's Caſe.

A Man cannot plead a former Judgement had againſt the Plaintiff, in an action brought by the Plaintiff againſt the Defendant. But Outlawry he may. Which was not denyed.

Baker againſt Webberly.

THat if a mans Dog runs at the Sheep and kills them, not with his conſent, there will no action lie. But otherwiſe if with his conſent.

Recovereis ſuffer per gardens of the lands of the Infant.

MEmorandum, That the 26 Decemb. 21 Iac. that letters under the privy ſignet, and ſign Manual, came unto the Judges of the Com. Pleas, importing that the King had been humbly petitioned by Mountioy Blunt, being under the age of 21 years, as well by himſelf as his kinred and Feoffees, into whoſe cuſtody the late deceaſed Earl of Devonſhire did commit his eſtate in truſt, that he would declare unto us his liking, that he might be permitted to ſuffer a Common recovery of the Manor of Wanſted, for payment of his debts, and further advancement of his means to the uſe of the Duke of Buckingham, which his Majeſtie by his

Trin. 7 Car. Com. Banc.

his said Letter did accordingly. Now although the Judges did never hold such Recoveries unlawfull or void in Law, yet divers motions in the like kind have been refused as holding it very inconvenient. But inconveniencies are best discerned by circumstances, and therefore my L. Chief Justice Richardson acquainting the other Justices therewith, it was determined that he should send for the young Gentleman, and examine him sole and secret of the reasons of this Recovery, and of his own free-will, Which I did, and being of 18 years of age or thereabouts suffered me of his own good liking, & that he did conceive it to be necessary for his estate; yet not therwith contented, the Chief Justice caused the Earl of Southampton, the L. Davers and Mr. Wakeman, the persons to whom the world knew he & his Estate was committed in trust, and that they had worthily performed, and calling them in an open Court, and questioning with them, they confessed to us all, that it was necessary for the young Gentleman, and for his good to part with this thing, and that therefore they had made means to his Majesty for this Letter in that behalf, whereupon the Recovery was passed openly at the Bar the last day of Michaelmas Term against Mr. Blunt in person, and the Earl of Southampton, the Lord Davers, and Mr. Wakeman were admitted his Guardians.

Brownlow and Moyle Prothonotaries shewed Presidents of the like Recoveries against Infants, M. 23 H. 8. rot. 441. et P. 38 H. 8 rot. 128. Tr. 28 El. rot. 17, et M. 26, et 27 El. rot. 45. 572 P. 42 Eliz. rot. 1. & 63, 44. 45, 69, 70, 89, 91, 94 P. 32 El. rot. 60 T. 38 El. rot. 41, 44, 40 El. rot. 62. 124, & 112 M. 40, et 41 El. rot. 13 M. 34, et 35 El. rot. 166. per Zouch, M. 39 & 40 Eliz. rot. 82. & 173. M. 41, & 42 El. rot. 24. & 106. et 72 T. 42. El. rot. 20. M. 42 et 43 El. rot. 173.

Chamberlines Case.

HE brought an Action upon the Statute of Hue and Cry, and after Issue, joyned and entred. The Record was, that the Robbery was done 30 Octob. It was ordered by the Court of Common Pleas that the Record shall be amended, and made the 30th. of September upon the Affidavit of the Attorney for the Plaintiff, that he had given direction accordingly. And shews to the Court the Book of the Office.

Male against Kett.

HE brought an Action against Kett for these words, Thou hast stolen my Corn out of my Barn; and verdict was given for the Plaintiff. And after verdict it was moved in arrest of Judgement. That perchance the Corn was not of the value of a penny. Yet Judgement was given for the Plaintiff. For it is felony, although it is not great.

Hitcham against Cason before.

NOw they urged, 5 Eccles. If thou see the oppression of the poor and perverting of Judgement. Perverting of Judgement is the Oppression: But then he did not again manifest Injustice. It was objected that he might give erroneous Judgement, and that is Injustice. If they are taken all alike, it is clear that they are actionable, and the party himself ought not to interpret but the Judge. The Case between Palmer and Boyer, M. 37, 38 El. He hath as much Law as a Jackanapes, spoken of Palmer being a Lawyer, and adjudged actionable. And they were spoken to disgrace him in his profession. 7 Iac. Thou a Barrester, thou a Barrettor, and thou durst not shew thy face. Thou study the Law, thou a Dunce; actionable upon the

he ſame reaſon. Mich. 14 Iac. Com. Banc. Beck againſt Barneby. Spoken of an Attorney, Thou art a Common maintainer of Sutes, and a Champerter, &c. It was objected there, that it was lawfull for an Attorney to maintain ſutes. Yet becauſe he ſaid Champertor it was actionable. And Trin. 12 Iac. Com. Banc. Yeardlies caſe he ſaid of the Plaintiff being an Attorney, Your Attorney is a bribing Knave, and hath taken 10 l. of you to couſen me; Anſwered that the words ſhall be intended of him as Attorney, and ſo actionable. One exhibites a Petition, where it was firſt againſt the Lord chief Baron. In which he ſaid Tanfield is a great Oppreſſor of the Country, and did remove the Boundaries between his Land and mine. And it was adjudged actionable, Paſc. 4 Iac. Banc. Roy. Maſter Kebbe is a Basket Iuſtice, and a partial Iuſtice, and I'll give him 5 l. a year for all Gifts that are brought to him for Injuſtice done. And adjudged actionable. And the word Partial Iuſtice bears an Action Hil. 40 Car. Kings Bench. Denſon is a ſweet Iuſtice of peace, who gave a Warrant to apprehend I. S. and ſent him notice of it, Is actionable For it is a misbehaviour in a Juſtice of Peace to do ſo, H. 6. Iac. Com. Banc. rot. 1159. Lonſman againſt Peck The Plaintiff ſhews that he had been impannelled upon ſeveral Juries upon life and death; and the Defendant ſaid, Thou art a Jury man, and by ſubtile and falſe means thou haſt been the death of 100 men. For before verdict againſt them, and the words were that he was their death by falſe verdict. *Trin. 7. Car. Com. Banc.*

As to the War. That is naught, it appears by the War, that the Defendant was not called to anſwer the Articles aforeſaid. For he ſaid the Plaintiff would not proceed upon them; Then the Plaintiff might be Iudge, witneſs and party, and not oppreſs me, &c. And it is not Juſtice for one Juſtice of Peace to refuſe to proceed. As here, If Articles be given to him, the Witneſſes perhaps are not ready, and although he requeſt the Plaintiff to proceed, it is not the Office of a Juſtice of peace to promote a Cauſe. For the words continue he juſtifies ſcribi fecit. And that is no juſtification to contrive, which is a word well known, and apt to ſignifie the framing or inventing of Articles, &c. And the words are in the Declaration, and did then oppreſs me. And there is nothing anſwered to them, or juſtified to it. Paſc. 24 Kings Bench Actions for words in London, and the Defendant juſtifies the words in S. the Plaintiff demurred and had Iudgement M. 27 Eliz. Kings Bench. An Action for calling the Plaintiff Thief. The Defendant pleads the Plaintiff guilty in 3 ſeveral Felonies. And iſſue was taken de injuria ſua propria, abſque aliqua tali cauſa. And the Plaintiff was found guilty of two Felonies, but not of the third. And it was adjudged for the Plaintiff, becauſe he failed of his tali cauſa: upon which he concludes, &c. Bramſton at an other day on the contrary. And ſaid that the Declaration is not good.

Firſt, it muſt appear plainly that the Plaintiff was a Juſtice of Peace at the time of the ſpeaking of the words. and implication will not ſerve. I agree that neceſſary intendment ſhall be ſufficient: And if there might be other intendment, it is not ſufficient 13 Eliz. Dyer 304. Micb. 20 Iac. Kings Bench. Arundel Plaintiff, Mead and Harvey Defendants in an Ejectione firmæ brought upon a Leaſe made for 5 years, if a Woman ſhould ſo long live. And after verdict for the Plaintiff. It was moved that the Declaration is not good. Becauſe that it was not averred that the Woman was living at the time of the Ejectment. But it was adjudged that the words virtute cujus he was poſſeſſed, and termino nondum finito, he was ejected ſupplies that; Dyer 254. Debt upon a Leaſe for years rendring rent, the Plaintiff declars upon the leaſe by him made to A. who deviſes it to the Defendant and he enters. And it was objected that the Declaration was naught, becauſe that he does not ſhew the aſſent of the Executors, and it is not ſaid virtute Legationum, &c. But that

Trin. 7 Car. Com. Banc.

be entred and that may be by any other Title, and for that naught. And in our Caſe that he was a Juſtice of Peace many years before, and at the time of the ſpeaking. And the words premiſor. non ignorant. the Defendant intending to remove him, &c. does not aid it. For it might be meant when he was not a Juſtice of Peace: It is not but by argument that he was then a Juſtice of Peace.

Secondly, The ſecond Objection. The ſecond words are not laid to be ſpoken of Robert Hitcham aforeſaid. It is to be obſerved that the words, And he did then, &c. be diſtinguiſhed in time. For it is poſtea ad tunc et ibidem. By which it ought to be meant ſpoken at another time of the ſame day, and then all the ſubſequent words not actionable. And it is not ſufficient (as it was objected) that he was a Juſtice of Peace, when the Injuries were ſuppoſed to be done. There are two reaſons why a Juſtice of Peace ſhall have his Action for words.

Firſt, That if the words be true, they expoſe him to puniſhment or pain, and either of them is ſufficient cauſe to make the words actionable. And when the words are ſuch, that they do not expoſe the party to puniſhment, but only diſcredit him in his profeſſion, and make him ſubject to be removed, they are not actionable unleſs ſpoken at the time that he is a Juſtice of Peace, And here the words are of ſuch nature. But words which expoſe him to puniſhment for a miſdemeanour when he was a Juſtice of Peace are actionable, although ſpoken after he was removed.

Secondly, If the Declaration was defective in ſubſtance, for want of a preciſe, ſhewing, that he was a Juſtice of Peace at the time; Nothing in the Bar will help it. But defect in circumſtance may be ſo aided (ſcil.) by the Bar, as time or place failing in the Bar may be ſupplied by the Bar. 6 E. 4. 16. 6 E. 4. 2. 7 Rep. 24. Buts Caſe, Mi. 37. 38 Eliz. Badcop againſt Atkins, Thy Father hath ſtollen ſix ſheep. It was moved in arreſt of Judgement: Becauſe it was not ſhewn in the Declaration that the words were ſpoken to the Son, or in his preſence of his Father the Plaintiff. And as to that it ought to be intended. For it is not ſenſe to ſay thy Father to any but the Son. Secondly the Defendant admitted it in his Bar. But reſolved by the whole Court it is not neceſſarily implyed that they were ſpoken to the Son. And then it was agreed by all, that the Declaration was defective in ſubſtance, and is not aided by any admittance in the Bar.

Thirdly, The third Exception here is, there wants an Innuendo to make the Declaration good, where the place is neceſſary to make the words actionable. there ought to be an Innuendo for the place, &c. Barham did burn by Barn, there no Innuendo will make the words actionable. But if there be a Communication of the Plaintiffs Barn, and that it was full of Corn; there with an Innuendo horreum prædict. will ſerve. H. 37 Eliz. Banc. Roy rot. 334. Thou art a Thief, thou haſt ſtollen half an acre of my Corn, Innuendo half an acre of Corn ſevered. Adjudged that the Innuendo does not ſerve. So for Slander of title, Entries fol. 36. A. was ſeiſed of the Mannor of S. and there was a Communication of that Mannor of S. And the Defendant ſaid I have enough in my Study to make I.S. Heir to the Mannor of I.S. Innuendo manet. prædict de S. It is ſufficient.

Secondly, The words are not actionable. Witneſſe, Judge and party is not a ſcandal without a violent conſtruction of the words. To ſay, he did oppreſſe me. That of a Juſtice of Peace, without more, is hard to maintain an action; for it does not appear that he was damnified. And words of themſelves which are actionable, joyned with others are not ſometimes actionable. If one ſays of a Lawyer, he did reveal the ſecrets of my Caſe; that is not actionable, for he might reveal it to a Judge: But if he ſaid, Goe not to ſuch a one, he did reveal the ſecrets

of

of my caſe, that is actionable. Suegos caſe in the book of Entries. If one ſaid of a Chirurgion, he did poyſon the wound of his patient. That is not actionable, for it might be for the cure of it. But if he ſaid, as it was in 33 and 34 Eliz. Com. Banc., He did poyſon the wound of his patient to get money; That is actionable. And the words here are allayed, if they be joyned with the firſt; For being ſpoken of a Juſtice, his power and greatneſs may oppreſſe him, without fault in the Plaintiff. One ſaid M. 37 Eliz. of a Juſtice of Peace, That he was a Bloodſucker, and thirſteth after blood; yet if you'll give him a couple of Capons he'll take them, Not actionable, for they are too general. As to the Juſtification, all is juſtified clearly. It was objected (then) is omitted in our juſtification. It is true if he complain of oppreſſion one time, and we juſtifie at another time, it ſhall be inſufficient. But the matters of Juſtification here well enough meet with the time, By which, &c. *Trin. 7 Car. Com. Banc.*

Goſſe againſt Brown.

GOſſe brought an action upon an Obligation againſt Brown, dated 23 Feb. 20 Iac. to pay money upon the 30 of December following, It was then ſaid, that the money was not to be paid until the 30 day of December. For it is all one, as if the bond had been without date. But if the condition had been to have been paid the 33 Febr. It was then preſently due upon demand, becauſe it was an impoſsible date.

Gibbs againſt Ienkins.

GIbbs brought an action upon the caſe for ſcandalous welch words ſpoken in the preſence of divers underſtanding the language, And witneſſes were ſworn to the Jury who depoſed that the ſignification of thoſe words were to ſteal, or at leaſt to carry away. Which words in Engliſh not being able to bear an action, Judgement was given againſt the Plaintiff.

Ravyes Caſe.

A Sheriff had taken one by capias ad ſatisfac., a Stranger aſſumes to him, that if he will let him goe at large, that he would pay him what damages he ſhould ſuſtain thereby. No action upon the caſe will lie for that promiſe, becauſe it is againſt the Common Law. And 23 H. 6. 2 H. 5. If a man oblige another in a bond not to follow his trade, It is void.

Darlyes Caſe.

SErgeant Arthow ſhewed to the Court, that an action upon the caſe was brought by the Sheriff of S. And declares that the Defendant aſſumed that if he would put ſuch an one in Execution into the Caſtle, of which he had recovered againſt him, to ſave him harmleſs. And ſhews that he did take him in execution, and that for that he was indicted for a

Trin. 7. Car. Com. Banc.

forceable entry, and ſues in the Star-chamber ad damnum, 500 l. And the Court ſeemed that it was not a ſufficient conſideration: For it was no more than by his office he ought to doe. But if it was upon an other matter, otherwiſe it ſhould be. And for that they ſaid to the Serjeant, that he might have demurred to the Declaration.

NOte that it was ſaid that an Ejectione firm. does not lie de una pecia terræ; although that it was added, conteining by eſtimation half an acre of land vocat. It is not good. But he ought to ſhew the longitude and latitude. And it is otherwiſe in an aſsize, and that, for the view. And ſo it was held by the Court.

Hadves againſt Levit.

AN action upon the caſe was brought, That in conſideration the Plaintiff would conſent that his Son ſhould marry the Daughter of the Defendant, and that after the Coverture, upon requeſt of the Defendant, the Plaintiff ſhall make a joynture of 20 l. to the wife, That the Defendant ſhould give 200 l. to the Son in marriage, they are married, the mony is not payed the Father of the Son brings this action, and ſhews how he is indamaged by it, becauſe that he is conſtreined to give more to the Son and his Wife for to allow them maintenance then otherwiſe, with an averement, that he is forced to make that Joynture, if the other will make the requeſt. Richardſon, This action ſhould have been more properly brought by the Son, for he is the perſon in whom the intereſt is. And he put the caſe 22 Eliz. A man had a licenſe to tranſport Herrings to Spain, and the Daughter one of the parties had a licenſe. And a ſtranger comes to the Father, and ſays to him, procure me that licenſe, and I'll give you 100 l. and 100 l. to your daughter. It was held that the Daughter ſhould have the action for the one 100 l. for more ſpecially it concerns her. And put the caſe of Iorning & Iorning, 37 Eliz. Where A. was indebted to B. a ſtranger follows the ſute for B. A. comes to the ſtranger and ſays to him, leave the ſute, and I'll pay your Maſter. The Maſter ſhall have the action upon the caſe. And now in our caſe, the father does not demand the 200 l. but only the damages which will happen to him by the non-payment to the Son. Hutton, There is a difference when the promiſe is to perform to one who is not intereſſed in the cauſe, and when he hath intereſt. In the firſt caſe, he to whom the promiſe is made ſhall have the action, and not he to whom the promiſe is to be performed. If A. promiſe B. to pay I. S. 10 l. (upon a conſideration) which is not done, B. ſhall have the action, and not I. S. If there be two joynt of a Horſe, and the one conditions with the other to goe to Market to ſell it, who does it, and appoints the payment to be made to another; In this caſe he only to whom the payment is to be made ſhall have the action. So alſo if my ſervant, by my command, ſell my Horſe; the money to be paid to me; I ſhall have the action, and not my Servant, for the intereſt is in me. So here the intereſt is in the Son, and he is to have the money. It was ſaid at the bar between one Cardinal and Lewis. It was adjudged that where two fathers promiſe upon marriage between the daughter of the one, and the Son of the other, that the Father of the Son will give 100 l. ſtock, and the Father of the Daughter 100 l. in money; The money was paid, and the ſtock not delivered; And the action was maintained by the Father. And the Juſtices ſaid that they would ſee that Record. viz. 27 H. 8. Tatham's caſe of a promiſe made to the wife, &c. They

&c. They put at the bar one Cores Caſe, That a man promiſed to one, to make ſatisfaction of all debts in which he was indebted to another, who was then abſent. He to whom the ſatisfaction was to be made, brought the action upon the Caſe, and well maintainable, ve Mich. 43 & 44 Eliz. int. Rixon & Horton. Trin' 7 Car. Com. Banc.

Stone againſt Tidderſly.

THe action was brought upon an Obligation, the condition whereof was, that a conveyance of a Manor ſhall be made to one P. and two others, to the uſe of Richard Tidderſly, and the heirs males of his body; The remainder to the heirs males of Rob. Tid. Upon iſſue, whether conditions were perform'd. And it was found by verdict, that it was to the uſe of the heirs males of his body, the remainder to Rob. Tid. and the heirs males of his body. Held no performance, for they agreed not to the words of the Condition.

IT was agreed by all, That antient Demeſne was a good plea in Ejectione firm. but not after imparlance.

Croſſes Caſe.

THere was errour brought, becauſe the appearance was by Anthony Goodwin Attornat ſuum. And there was not any ſuch in rerum natura. The Court ſaid that this averment ſhall not be received againſt the Recorder of the Court.

FINIS.